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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1156~~. 754 434 150

THE WASHINGTON ICE COMPANY, JOSIAH H. DRUMMOND, AND WILLIAM E. GOULD, PLAINTIFFS IN ERROR,

vs.

NATHANIEL WEBSTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED OCTOBER 22, 1884.

accession 21553

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Nathaniel Webster, of Gloucester, in the Commonwealth and district of Massachusetts, and a citizen of said district of Massachusetts, plaintiff, and The Washington Ice Company, of the city, county, and State of New York, a corporation created and existing by law, and a citizen of said State, and Josiah H. Drummond and William E. Gould, both of Portland, in the State and district of Maine, and citizens thereof, a manifest error hath happened to the great damage of the said defendants, the said Washington Ice Company, Josiah H. Drummond, and William E. Gould, as by this complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. H. DAVIS,
Clerk of the Circuit Court of the United States, District of Maine.

Allowed by—
HORACE GRAY,
Justice of the Supreme Court of the United States.

2 *Return on Writ of Error.*

Circuit Court of the United States, District of Maine.

And now here the judges of the circuit court of the United States, in and for said district, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof, I, A. H. Davis, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, this third day of October, A. D. 1884.

[SEAL.] A. H. DAVIS, *Clerk.*

[Endorsed:] Maine district, office clerk C. C. U. S. Rec'd and filed Sep. 13, 1884. Attest: A. H. Davis, clerk.

3 *Citation.*

The United States of America to Nathaniel Webster, of Gloucester, in the Commonwealth of Massachusetts, and a citizen of said district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein The Washington Ice Company, of the city, county, and State of New York, a corporation created and existing by law, and a citizen of said State, and Josiah H. Drummond and William E. Gould, in the State and district of Maine, and citizens thereof, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Honorable Horace Gray, Associate Justice of the Supreme Court of the United States, this twelfth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

HORACE GRAY.

4 UNITED STATES OF AMERICA, } *ss.*
Maine District, }

SEPTEMBER 13, A. D. 1884.

I have this day served the within precept upon the within-named defendant by delivering in hand to Sewall C. Strout, Esquire, defendants' attorney of record, a true and attested copy of this precept.

H. D. MARBLE,
Deputy U. S. Marshal, District of Maine.

Service	2 00
Travel	06
Copy	50
	82 56

[Endorsed:] Maine district, *ss.* Office clerk C. C. U. S. Rec'd and filed Sep. 13, 1884. Attest: A. H. Davis, clerk.

5 *Bond.*

Know all men by these presents, that we, The Washington Ice Co., a corporation duly organized and of the city, county, and State of New York, and a citizen thereof, and Josiah H. Drummond and William E. Gould, both of Portland, in the State and district of Maine, and citizens thereof, and A. P. Gould and J. E. Moore, of

Thomaston, in the State and district of Maine, are held and firmly bound unto Nathaniel Webster, of Gloucester, in the Commonwealth and district of Massachusetts, in the full and just sum of one thousand dollars, to be paid to the said Nathaniel Webster, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly and severally by these presents.

Sealed with our seals, and dated the tenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the September term, A. D. eighteen hundred and eighty-two, of the circuit court of the United States for the district of Maine, in a suit depending in said court, between Nathaniel Webster, of Gloucester, in the State of Massachusetts, and a citizen thereof, and The Washington Ice Co., a corporation existing under the laws of the State of New York, and a citizen thereof, and Josiah H. Drummond & William E. Gould, both of Portland, in the State and district of Maine, and citizens thereof, judgment was rendered against the said Washington Ice Co., the said Josiah H. Drummond and William E. Gould, and the said Washington Ice Co., Josiah H. Drummond and William E. Gould having obtained a writ of error of the said court, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Nathaniel Webster, citing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said The Washington Ice Co., Josiah H. Drummond & William E. Gould shall prosecute said writ of error with effect, and answer all damages & costs, if they fail to make this plea good, then the above obligation to be void; else to remain in full force and virtue.

WASHINGTON ICE CO., [L. S.]
B. & P. GOULD, *Their Att'y.*
JOSIAH H. DRUMMOND. [L. S.]
WM. E. GOULD. [L. S.]
A. P. GOULD. [L. S.]
J. E. MOORE. [L. S.]

Sealed & delivered in presence of—
R. J. THOMPSON.
C. C. CORBETT.

Boston, Sept. 12, 1884.

Approved by—
HORACE GRAY.
Justice of the Supreme Court of the United States.

6 The above sureties are entirely responsible and satisfactory.
STROUT, GAGE & STROUT,
Att'ys for Nath'l Webster.

[Endorsed:] Bond from Washington Ice Co. *et al.* to Nath'l Webster. Maine district, *ss.* Office clerk C. C. U. S. Filed Sept. 13, 1884. Attest, A. H. Davis, clerk.

7 *Transcript of Record.*

UNITED STATES OF AMERICA, } ss:
Maine District, First Circuit. }

At a circuit court of the United States for the first circuit, begun and held at Portland, within and for the district of Maine, on Saturday, the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Before the Honorable Nathan Webb, district judge.

No. 5.

NATHANIEL WEBSTER, of Gloucester, in the Commonwealth and District of Massachusetts, and a citizen of said district of Massachusetts, Plaintiff,

versus

THE WASHINGTON ICE COMPANY, of the city, county, and State of New York, a corporation created and existing by law and a citizen of said State; Josiah H. Drummond, of Portland, in the county of Cumberland, and William E. Gould, of Deering, in said county, and both in our district of Maine, and citizens of said Maine, Defendants.

In a plea of debt, for that the said defendants, on the twelfth day of August, eighteen hundred and seventy, at said Portland, by their writing obligatory of that date, sealed with their seals, and
8 here in court to be produced, jointly and severally bound and acknowledged themselves to be indebted to the plaintiff in the sum of thirty thousand dollars, to be paid to the plaintiff on demand; yet the said defendants, though requested, have not paid the same, but neglect so to do, to the damage of the said plaintiff, as he says, the sum of forty thousand dollars.

This cause was brought and entered in this court at April term thereof, A. D. eighteen hundred and seventy-nine, and on the first day of said term was filed the following:

Motion to Dismiss.

And now The Washington Ice Co., on this first day of said term, comes, and moves the court that said action may be dismissed, as to them, for the following reasons, viz:

1. Because there has been no legal service of the plaintiff's writ upon the said The Washington Ice Co.

2. Because this court has no jurisdiction in this case over the said The Washington Ice Company, as fully appears by the plaintiff's writ.

THE WASHINGTON ICE CO.,
By A. P. GOULD, *Their Att'y.*

And thereafter, on the 14th day of May next ensuing, was filed the following:

9 *Offer of Default.*

And now on the 19th day of said term, the defendants come and offer to be defaulted, and that judgment may be rendered against them for the sum of fourteen thousand dollars damages and legal costs.

By A. P. GOULD, *Their Att'y.*

And on the same day last named is filed the following:

Defendant's Plea.

And now the said defendants come and defend, &c., when, &c., and pray over of the writing obligatory aforesaid, and its condition, and it is read to them, and the condition thereof is in these words, to wit:

The condition of the above obligation is such, that whereas the said "The Washington Ice Company" have this day commenced against the said Nathaniel Webster an action of replevin for a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain ice houses situate in the town of Boothbay, in the county of Lincoln and State of Maine, owned or occupied by Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand
10 dollars, which they say the said Nathaniel Webster hath unlawfully taken:

Now, therefore, if the said "The Washington Ice Company" shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void, otherwise to remain in full force; which being read and heard, the defendants say, that they have kept the several conditions of the said writing obligatory above set forth, except the following, to wit: "And also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment;" and as to this condition the defendants confess that they have not kept the same, and that final judgment has been rendered against them in the replevin suit, in said condition mentioned, for a return of the goods and chattels replevied therein, and that they have not returned the same to the plaintiff according to the requirement of said condition. The defendants therefore submit to the judgment of the court and pray that they may [be] heard by the court
11 in equity in the assessment of damages for the breach of said last mentioned condition.

By A. P. GOULD, *Their Att'y.*

And on the 15th day of said May said motion to dismiss is withdrawn, and said cause is continued from term to term to April term, A. D. 1880, when, on the 3rd day of September, said offer of default is rejected; and on the same day is made the following:

Motion for Judgment and Execution.

And now comes the plaintiff and moves the court for judgment for the penal sum of the bond declared on, and moves that execution may issue for the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest from the date of the verdict in the replevin suit.

By their attorney, BENJ. F. BUTLER.

Which motion, on the day of the filing thereof, is heard by Clifford and Fox, J. J., and overruled as premature; and on the same day is filed the following:

Motion for Judgment.

Now the plaintiff moves the court that judgment may be entered upon the penal sum of the bond declared on.

BENJ. F. BUTLER.

12 Which motion is on the same day heard by said justices and allowed, and judgment is entered for the plaintiff for the penalty of the bond, execution to issue for such sum as shall hereafter legally be ascertained.

And on the same day is filed the following:

Motion for Auditor.

And now the defendants come and move that an auditor be appointed to hear the parties, and report to the court the amount for which execution shall issue, and to report the evidence upon which said amount of damages is made up by him.

By A. P. GOULD,
Their Att'y.

Which motion is also, on the same day, heard by said justices and overruled as premature.

Said cause is continued to the September term next ensuing, when, on the 12th day of October, is filed the following:

Offer of Default.

And now the said defendants come and offer to be defaulted, and that judgment may be rendered against them for the sum of sixteen thousand dollars and legal costs, and that execution may issue against them for the same.

By A. P. GOULD,
Their Att'y.

13 Which offer of default is thereafter, to wit, on the first day of November, A. D. 1880, declined by the plaintiff, and on the ninth day of said November is filed the following:

Motion to Strike off Judgment.

And now the defendants come and move the court that the entry of "judgmsnt for the penalty of the bond" which has been made upon the docket of this action, be stricken off, and that judgment may be entered only for such damages as shall be assessed in the manner directed by the court.

By A. P. GOULD,
Their Att'y.

Whereupon said cause is, by the court committed to a jury, duly impaneled and sworn, but on the second day thereafter, and before a verdict is rendered, said cause, on motion of the plaintiff, is continued, and defendants have leave—Fox, J.—to plead anew within thirty days after amendment of record in the State court, if amendment shall be made. And said cause is further continued from term to term to September term, A. D. 1882, when is filed the following:

Stipulation.

The parties to the above-entitled action, by their attorneys
14 of record, hereby stipulate and agree to waive a jury in the trial of the same, and that the issues of fact therein may be tried and determined by the court.

STROUT, GAGE & STROUT,
Attorneys for Plaintiff.
A. P. GOULD,
Attorney for Defendants.

And now said cause came on to be heard before Webb, J., and before the finding of the court thereon, the counsel for the defendant company requested the court to give certain rulings and decisions in matters of law, each and all of which requests of said defendant were then and there refused by the court as inapplicable to the evidence produced, to which refusals, and each and every of them, the defendant then and there, in open court, and before the finding of the court, excepted, and prayed of the court that said exceptions, and each of them, might be allowed, and they were thereupon allowed.

And the court, instead of the rulings and decisions in matters of law, requested by the defendant, did give certain other rulings
15 and desisions, in matters of law, to which said defendant seasonably excepted, and prayed that said exceptions might be allowed. And the said defendant thereupon, before final decision of the cause, presented his bill of exceptions, and prayed that the same might be allowed and signed by the court, and made part of the record in the case, which bill of exceptions was allowed and signed, and made a part of the record, as follows:

Bill of Exceptions.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the District of Maine. In the First Circuit. September Term, 1882.

NATHANIEL WEBSTER

vs.

THE WASHINGTON ICE COMPANY, JOSIAH H. DRUMMOND, and WILLIAM E. GOULD.

Be it remembered, that at a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on the twenty-third day of September, A. D. 1882, by the Honorable Nathan Webb, district judge, sitting as a circuit judge, came Nathaniel Webster, of Gloucester, in the State of Massachusetts, and a citizen of the State of Massachusetts, and by a writ in a plea of debt declared
16 against the Washington Ice Company, of the city and State of New York, a corporation duly organized under the laws of said State of New York, and Josiah H. Drummond and William E. Gould, both of Portland, in the State of Maine, and citszens of the State of Maine; said action having been commenced on the thirteenth day of February, A. D. 1879, by writ returnable in the circuit court of the United States for the first circuit, at the term holden at Portland, within and for the district of Maine, on the twenty-third day of April, A. D. 1879; and said parties then and there appeared, and the said defendants prayed over of the writing obligatory declared upon in the plaintiff's writ, and its condition, and it was then read to them, and the condition thereof is in these words, to wit: "That whereas the said 'The Washington Ice Company' have this day commenced against the said Nathaniel Webster an action of replevin for a certain lot of ice, being about thirty-eight hundred tons of ice now lying and being in certain ice-housess, situate in the town of Boothbay, in the county of Lincoln, and State of Maine, owned or occupied by Nathaniel Webster, of Glouccester, in the county of Essex, and Commonwealth of Massachusetts, of the value of
17 fifteen thousand dollars, which they say the said Nathaniel Webster hath unlawfully taken: Now, therefore, if the said The Washington Ice Company shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void, otherwise to remain in full force," which being read and heard the defendants in their plea say: "That they have kept the several conditions of the said writing obligatory above set forth," except the following, to wit: "And also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment;" and as to this condition the defendants confess that they have not kept the same, and that final judgment has been rendered against them in the replevin suit

in said condition mentioned, for a return of the goods and chattels replevied therein, and that they have not returned the same to the plaintiff according to the requirement of said condition.

18 The defendants, therefore, submit to the judgment of the court, and pray that they may be heard by the court in equity in the asssesment of damages for the breach of said last mentioned condition," as by the writ, declaration, and plea aforesaid, all of record, will appear.

And the said action was then continued until the present term when the parties appeared, and by their attorneys, filed with the clerk of said court a stipulation in writing waiving a jury, and thereupon said cause came on for trial before said circuit court, at said September term. And the plaintiff, to maintain and prove the issue on his part, introduced the following papers and document, to wit, the original writ in the said action of replevin, dated August 12, 1870, returnable to the supreme judicial court for the State of Maine, for the county of Lincoln, at a term held on the fourth Tuesday of October, A. D. 1870, with the officer's return, and amended return thereon, which is marked "Plaintiff's Ex-ibit A," as follows:

PLAINTIFF'S EXHIBIT A.

STATE OF MAINE, }
Cumberland, } *ss*:

[SEAL.] To the sheriff of the county of Lincoln, or either of his deputies, Greeting:

19 We command you that you replevy the goods and chattels following, viz:

A certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain ice-houses situate in the town of Boothbay, in the county of Lincoln, and State aforesaid, and owned or occupied by Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, belonging to the Washington Ice Company, of the city, county, and State of New York, a corporation duly organized by law, and having its place of business in said city of New York, now taken and detained by Nathaniel Webster, of said Gloucester, at Boothbay aforesaid, and then deliver unto the said The Washington Ice Company, provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution as the property of the said plaintiff, and summon the said defendant, that he appear before our justices of our supreme judicial court to be holden at Wiscasset, within and for our said county of Lincoln, on the fourth Tuesday of October, 1870, to answer unto the said plaintiff in a plea of replevin; for that the said defendant, on the first day of August, A. D. 1870, at said Boothbay, unlawfully, and

20 without any justifiable cause, took the goods and chattels of the said plaintiff, as aforesaid, and there unlawfully detained to this day, to the damage of the said plaintiff, as they say, — the sum of thirty thousand dollars:

Provided they, the said plaintiffs, shall give bond to the said defendant, with sufficient sureties, in the sum of thirty thousand dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said defendant shall recover against them; and also to return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment; and have you there this writ, with your doings herein, together with the bond you shall take.

Witness John Appleton, Esquire, at Portland, the twelfth day of August, in the year of our Lord one thousand eight hundred and seventy.

D. W. FESSENDEN, *Clerk.*

LINCOLN, *ss:*

AUGUST 13, 1870.

By virtue of this writ I have taken the ice within named as the property of the within-named Washington Ice Company, and
21 on the nineteenth day of August, A. D. 1870, I delivered said ice to Hiram Perkins, whom the Washington Ice Co. designated as their agent to receive said ice; and on the nineteenth day I summoned the within-named Nathaniel Webster by reading this writ in his presence and hearing for his appearance at court—the quantity replevied by actual weight being about twenty-five hundred tons.

THOMAS BOYD,
Dept. Sheriff.

Fees:

Service		10
Keeping property 168 hours	28	00
Travel, 82; tolls, 40c.	2	40
	$31	10

By leave of court granted this fifth day of the April term of the sup. jud. court for the county of Lincoln, I hereby amend my return upon the original writ in this action, The Washington Ice Co. *v.* Nathaniel Webster, so that the same shall read as follows: and hereby annex the following to said writ as my return thereon, in the stead of my original return thereon:

LINCOLN, *ss:*

AUG. 13, 1870.

By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice by me found in the ice-houses within mentioned, all of which said ice I caused to be
22 weighed on delivery at the wharf in said Boothbay, about three miles from said ice-houses, being the nearest place thereto where ice could be shipped, twenty-two hundred and ninety-seven tons and nineteen hundred and twenty-one pounds of which was thus weighed on successive days, portions of it on each week

day, between the twenty-third day of August, 1870, and the sixteenth day of September, 1870, and thirty-three tons and nineteen hundred and thirty pounds thereof was thus weighed on three several days, between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870, the whole of said ice thus taken by me weighing twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds, and on the nineteenth day of said August, 1870, I delivered all the said ice at said ice-houses to the plaintiff, reserving to myself authority to weigh the same; and on the nineteenth day of said August I summoned the within-named Nathaniel Webster to appear at court as within directed, by reading this writ aloud in his presence and hearing.

THOMAS BOYD,
Dept. Sheriff.

LINCOLN, *ss:*

Sup. jud. court. April term, 1875, 9th day. Filed and all'd.
Attest: GEO. B. SAWYER, *Clerk.*

23 A true copy of the writ, officer's return, and amended return thereon.
Attest: CHARLES WEEKS, *Clerk.*

The pleadings in said action of replevin, which are marked "Plaintiff's Exhibit B," as follows:

PLAINTIFF'S EXHIBIT B.

Sup. Jud. Court. Oct. T., 1871.

WASHINGTON ICE CO. *v.* NATH'L WEBSTER.

And said defendant comes and defends, &c., when, &c., and says that he did not take and detain the goods and chattels in the plaintiff's writ and declaration mentioned, in manner and form as the plaintiffs in their writ and declaration against him have declared, and of this puts himself on the country.

By his att'y, HENRY INGALLS.
And the pl'ffs likewise By GOULD & HUBBARD,
Their Att'ys.

And for brief statement and special matter in defense said def't says: That at the time of the alleged taking, as set forth in the plaintiff's writ, the ice named therein was not the property of the plaintiff, nor any part thereof, nor had said plaintiffs and right to the possession thereof, but at the time of the said alleged taking, the whole of said ice was the property of said def't and of one
24 David C. Babson, and was rightfully in the possession of said def't, and was at the time of said alleged taking wrongfully taken from the lawful possession of said def't by said pl't'ffs, and has ever since been unjustly and wrongfully kept and detained by said plaintiffs.

Wherefore said def't prays judgment for a return of said ice in

like good order and condition as when the same was taken from the possession of said def't, and for his damages for such taking and detention, and for his costs.

By his att'y, HENRY INGALLS.

A true copy of pleadings.
Attest: CHARLES WEEKS, *Clerk.*

STATE OF MAINE, *Lincoln,* } ss:

CLERK'S OFFICE SUPREME JUDICIAL COURT.

In testimony that the foregoing is a true copy of the writ, officer's return, and amended return, and of the pleadings in case The Washington Ice Co. *vs.* Nath'l Webster, on file in this office, I make this certificate, and hereunto set my name and affix the official seal of the court aforesaid, at Wiscasset, in said county of Lincoln, the 10th day of August, in the year of our Lord one thousand eight hundred and eighty-three.

[L. S.] CHARLES WEEKS,
25 *Clerk of the Supreme Judicial Court in the County aforesaid.*

The record of the judgment and of the proceedings of the court in the action of replevin, said judgment being dated May 4, 1878, which record is marked "Plaintiff's Exhibit C," as follows:

PLAINTIFF'S EXHIBIT C.

STATE OF MAINE, *Lincoln,* } ss:

At the supreme judicial court, begun and holden at Wiscasset, within and for the county of Lincoln, on the fourth Tuesday of April, being the twenty-third day of said month, A. D., 1878, by the Honoral Artemas Libby, justice of said court.

ICE COMPANY *vs* WEBSTER. } No. 59.

The Washington Ice Company of the city, county, and State of New York, plaintiff, *vs.* Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, defendant, wherein the sheriff of said county of Lincoln or either of his deputies was commanded to replevy a certain lot of ice of the said plaintiff, being about thirty-eight hundred tons, lying and being in certain ice-houses situated in the town of Boothbay, in said county, owned or occupied by the defendant, of the value of fifteen
26 thousand dollars, and to summon the defendant to answer to the said plaintiffs in a plea of replevin, for that the said defendant, on the first day of August, A. D. 1870, at said Boothbay, unlawfully and without any justifiable cause, took the goods and chattels of the said plaintiffs as aforesaid, and then unlawfully detained to this day, to the damage of the said plaintiffs, as they say, [of] the sum of thirty thousand dollars.

The writ in this action is dated August 12th, 1870, and Thomas Boyd, a deputy sheriff of said county of Lincoln, made a return on said writ as follows, to wit:

LINCOLN, *ss:*

AUGUST 13, 1870.

By virtue of this writ I have taken the ice within named as the property of the within-named Washington Ice Company, and on the nineteenth day of August, A. D. 1870, I delivered said ice to Hiram Perkins, whom the said Washington Ice Company designated as their agent to receive said ice, and on the 19th day I summoned the within-named Nathaniel Webster, by reading this writ in his presence and hearing, for his appearance at court.

The quantity replevied by actual weight being about twenty-five hundred tons.

27 This action was entered at the October term, 1870, and continued from term to term to the October term, 1871, when the defendant filed the following plea, to wit:

And said defendant comes and defends, &c., when, &c., and says that he did not take and detain the goods and chattels in the plaintiffs' writ and declaration mentioned, in manner and form as the plaintiffs in their writ and declaration against him have declared, and of this puts himself on the country.

By his attorney, HENRY INGALLS.

Which was joined by the plaintiffs.

And the defendant also filed the following brief statement, to wit:

And for a brief statement and special matter in defense, said defendant says that at the time of the alleged taking, as set forth in the plaintiff's writ, the ice named therein was not the property of the plaintiff, nor any part thereof, nor had the said plaintiff any right to the possession thereof, but that at the time of the said alleged taking the whole of the said ice was the property of said defendant and of one David C. Babson, and was rightfully in the possession of said defendant, and was at the time of said alleged

28 taking wrongfully taken from the lawful possession of said defendant by said plaintiff, and has ever since been unjustly and wrongfully kept and detained by said plaintiff, wherefore said defendant prays judgment for a return of said ice in like good order and condition as when the same was taken from the possession of said defendant, and for his damages for such taking and detention, and for his costs.

The same was then submitted to the full court on the report of the evidence by the presiding judge, and marked "Law," and transferred to the supreme judicial court for the middle district.

The same was then continued *nisi*, and afterwards, to wit, June 26, 1874, the following order is received, duly certified by the clerk of said court for said middle district, viz: "The non-suit to stand, judgment for return of the goods replevied, damages to the time

of taking to be assessed at *nisi prius*, if the defendant so elect, or he may, if he prefer, resort to his remedy on the bond."

The same was then continued to the October term, 1874, when the defendant elected to have his damages assessed by a jury.

29 The same was then continued to the April term, 1875, when leave was granted to the officer who served the writ to amend his return thereon in accordance with the facts, and thereupon the officer made the following as his amended return, which was allowed by the court:

LINCOLN, *ss:*

AUGUST 13, 1870.

By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice by me found in the ice-houses within mentioned, all of which said ice I caused to be weighed on delivery at the wharf in said Boothbay, about three miles from said ice-houses, being the nearest place thereto where ice could be shipped—twenty-two hundred and ninety-seven tons and nineteen hundred and twenty-one pounds, of which was thus weighed on successive days, portions of it on each week day between the twenty-third day of August, 1870, and the sixteenth day of September, 1870, and thirty-three tons and nineteen hundred and thirty pounds thereof was thus weighed on three several days between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870, the whole of said ice thus taken by me weighing twenty-three hundred and thirty-one tons and eighteen hundred and fifty-

30 one pounds, and on the nineteenth day of said August, 1870, I delivered all the said ice at said ice houses to the plaintiff, reserving to myself authority to weight the same; and, on the nineteenth day of said August I summoned the within-named Nathaniel Webster to appear at court, as within directed, by reading this writ aloud in his presence and hearing.

The same was heard and tried by a jury duly empanelled; and the presiding judge submitted to the jury to find, in addition to their verdict, answers to the questions hereinafter set forth; and the jury, on the fourteenth day of the term, being the fourteenth day of May, 1875, returned their verdict as follows:

"The jury find that the defendant was damaged by reason of the taking of the property replevied in the suit, and assess damages for the defendant in the sum of six thousand five hundred and fifty-five dollars."

And the jury returned answers to the questions submitted, as follows:

First. What was the value of the ice replevied where it was situated at the time it was taken in this suit?

Answer. Twenty thousand and sixty-nine dollars and thirty-three cents.

Second. What damage did the defendant sustain by reason

31 of the taking of the ice in replevin on account of the preparations he had to make to remove it?

Answer. Eight hundred and thirty-five dollars and twenty-five cents.

And thereupon the plaintiff filed exceptions to the rulings of the judge in matters of law, which were allowed and signed by the judge.

And the plaintiff moved to set the verdict aside, because it was against law and evidence, and the evidence was reported to the law court.

The same was then marked "Law on exceptions and report," and transferred to the supreme judicial court for the middle district.

The same was then continued from term to term to the present term, and now the same is continued *nisi*, and afterwards, to wit, on the tenth day of June, 1878, the following order is received, duly certified by the clerk of the court of said middle district, to wit: "Motions and exceptions overruled."

It is, therefore, considered and ordered by the court that the property replevied be returned and restored to the said Nathaniel Webster irrepleviable, and that the said Nathaniel Webster recover against
the said Washington Ice Company the sum of seven thousand
32 seven hundred twenty-three dollars and ninety-eight cents
damages for the taking and detaining the property replevied, being the amount of the verdict, with interest thereon to the date of this judgment; and also that said Webster recover his costs of suit taxed at four hundred and seventy-seven dollars and sixty-seven cents.

Judgment rendered May 4th, 1878.

Writ of restoration issued July 31st, 1878.

Attest: CHARLES WEEKS, *Clerk.*

A true copy of record amended by order of court.

Attest: CHARLES WEEKS, *Clerk.*

STATE OF MAINE, }
Lincoln, } *ss:*

CLERK'S OFFICE, SUPREME JUDICIAL COURT.

In testimony that the foregoing is a true copy of amended record in the suit The Washington Ice Company *v.* Nathaniel Webster, I make the certificate, and thereunto set my name and affix the official seal of the court aforesaid at Wiscasset, in said county of Lincoln, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[L. S.] CHARLES WEEKS,
Clerk of the Supreme Judicial Court in the County aforesaid.

STATE OF MAINE, }
Lincoln, } *ss:*

I, John Appleton, chief justice of the supreme judicial
33 court of the State of Maine, hereby certify that Charles Weeks, Esquire, whose signature above affixed, is clerk of the supreme judicial court for said State, for the county of Lincoln, and is by law the proper person to make out and certify copies of all records and proceedings of the supreme judicial court, holden within

and for said county of Lincoln, and that full faith and credit is, and ought to be, given to his act and attestations done as aforesaid, and that his attestation is in due form of law.

In testimony whereof, I have hereunto set my hand and the seal of said court, this seventh day of October, anno Domini, one thousand eight hundred and eighty-two, and in the 106th year of the Independence of the United States of America.

[L. S.] JOHN APPLETON.

The defendant objected to the admission of the following question to the jury and their answer thereto, recited in said record, to wit: "What was the value of the ice replevied where it was situated at the time it was taken in this suit?

Answer. Twenty thousand and sixty-nine dollars and thirty-three cents."

But the court overruled the defendant's objection and ad-
34 mitted said question and answer, to which the defendant excepted.

The plaintiff then introduced the writ of return duly issued upon said judgment, dated July 31st, 1878, with the admission thereon endorsed, signed by A. P. Gould, the defendant's attorney of record in the replevin action, dated August 19, 1878, and the receipt and discharge thereon, signed by Henry Ingalls, plaintiff's attorney of record in said action of replevin, which writ of return is marked "Plaintiff's Exhibit D."

PLAINTIFF'S EXHIBIT D.

LINCOLN, *ss:*

To the sheriffs of our several counties or either of their deputies, Greeting:

Whereas the Washington Ice Company of the city, county, and State of New York, a corporation duly organized by law, and having its place of business in said city of New York, lately replevined the goods and chattels following, to wit: Twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds of ice, lying and being in certain ice-houses, situated in the town of Boothbay, in the county of Lincoln and State of Maine, all of the value of twenty thousand and sixty-nine dollars and thirty-
35 three cents, which Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, had unlawfully taken and unjustly detained, as the said Washington Ice Company suggested, and caused the said Nathaniel Webster to be summoned before our justices of our supreme judicial court, holden at Wiscasset, for and within our county of Lincoln aforesaid, to answer unto the said Washington Ice Company for such supposed unlawful taking and detaining at a day now passed.

And whereas at our said supreme judicial court holden at Wiscasset, for and within our county of Lincoln aforesaid, on the fourth Tuesday of April, A. D. 1878, upon a hearing of the cause of taking and detaining the said goods and chattels before our said justices,

it appeared that the said taking and detaining was not lawful and justifiable, whereupon it was then and there considered that the said goods and chattels be returned and restored to the said Nathaniel Webster irrepleviable, and the said Nathaniel Webster recover against the said Washington Ice Company the

$7,723 98
477 67

sum of seven thousand seven hundred and twenty-three dollars and ninety-eight cents damages for the taking the same by said process

36 $8,201 65
40

of replevin, and for the further sum of four hundred and seventy-seven dollars and sixty-seven cents for his costs arisen in the defense of said suit, as to us appears of record, whereof execution remains to be done:

We command you, therefore, that you forthwith return and restore the said property unto the said Nathaniel Webster, and also of the money of the said Washington Ice Company, or of their goods, chattels, or lands, within your precinct at the value thereof in money, you cause to be levied, paid, and satisfied unto the said creditor, the aforesaid sums being eight thousand two hundred and one dollars and sixty-five cents in the whole, with interest from the fourth day of May, 1878, being the time of the rendition of judgment, together with forty cents more for this writ; and thereof also to satisfy yourself for your own fees.

Hereof fail not, and make return of this writ, with your doings therein, into the clerk's office of our said supreme judicial court in three months from the date hereof.

Witness John Appleton, Esquire, at Wiscasset, the thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

37 CHARLES WEEKS, *Clerk.*

$8,379.36. WISCASSET, *Sept.* 17, 1878.

Received of the Washington Ice Company, by its check on the First National Bank, Rondout, N. Y., payable to Gould & Moore, att'ys, and by them endorsed to Henry Ingalls, eight thousand three hundred seventy-nine $\frac{36}{100}$ dollars, in full for the damages and costs within named, the damages being $7,723.98 and the costs $477.67, with interest thereon from the date of judgment, together with forty cents for writ of restitution, as per my receipt for the same of even date herewith; this receipt not to affect any further claim of the within-named Webster for the ice named in said writ, or for any further damages or costs that may be recovered or recoverable by said Webster.

NATHANIEL WEBSTER,
By HENRY INGALLS, *His Att'y.*

I hereby acknowledge that a demand has been duly made upon me, as one of the attornies of record of the Washington Ice Company, for a return *or* the ice mentioned in the writ of restitution issued in favor of Nathaniel Webster against said Washington Ice Company

from the office of the clerk of the supreme judicial court for
38 the county of Lincoln, on the 31st day of July, 1878.

Dated this nineteenth day of August, A. D. 1878.

A. P. GOULD.

And it was admitted by the defendants that a demand was duly made upon them for the return of the ice replevied by virtue of said return on the said nineteenth day of August, A. D. 1878.

The plaintiff also introduced the bond declared upon in the writ and declaration in this action, dated August 12, 1870, which is marked "Plaintiff's Exhibit E."

PLAINTIFF'S EXHIBIT E.

Know all men by these presents, that we, The Washington Ice Company, of the city, county, and State of New York, a corporation duly established by law, as principals, and Josiah H. Drummond and William E. Gould, both of Portland and the county of Cumberland, are holden and stand firmly bound and obliged unto Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, in the full sum of thirty thousand dollars, to be paid to the said Nathaniel Webster, his executors, administrators, or assigns; to which payment, well and truly to be made, we
39 hereby bind ourselves, our successors, and our respective heirs, executors, and administrators, jointly and severally, in the whole and for the whole, firmly by these presents. Sealed with our seals.

Dated the twelfth day of August, anno Domini one thousand eight hundred and seventy.

The condition of the above obligation is such that whereas the said The Washington Ice Company have this day commenced against the said Nathaniel Webster an action of replevin for a certain lot of ice, being about thirty-eight hundred tons of ice now lying and being in certain ice-houses situate in the town of Boothbay, in the county of Lincoln and State of Maine, owned or occupied by Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, which they say the said Nathaniel Webster has unlawfully taken:

Now, therefore, if the said The Washington Ice Company shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such
40 shall be the final judgment, then the said obligation to be void; otherwise to remain in full force.

THE WASHINGTON ICE COMPANY, [L. S.]

By HUGH J. BEAN, *Their Att'y.*

JOSIAH H. DRUMMOND. [L. S.]

WILLIAM E. GOULD. [L. S.]

Signed, sealed, and delivered in presence of—

CHARLES L. DRUMMOND to H. J. B. & J. H. D.

JOSIAH H. DRUMMOND to W. E. G.

All exhibits are made a part of this bill of exceptions.

The plaintiff thereupon contended that the defendants were estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin and in the replevin bond (being the bond in suit) at whatever time that value is to be assessed, but that the plaintiff was not precluded from showing that it was of greater value.

The defendants claimed that they were not thus estopped or precluded, and offered evidence to show that the value of the ice replevied was less than ten thousand dollars at whatever time such value is to be assessed, and submitted to the court the following prayer for a ruling on this subject, viz: That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars by reason of the insertion of that sum in
41 the replevin writ and bond as the value of the goods which the officer in that writ was commanded to replevy.

The court rejected the evidence offered and overruled this prayer of the defendants, and ruled that the defendants are estopped, as is contended by the plaintiff, and that the plaintiff is not precluded from showing that the value of the goods replevied were more than fifteen thousand dollars.

To which rejection of evidence and ruling the defendant then excepted.

The defendant contended that the statement of the officer who served the replevin writ in his returns thereon of the quantity of goods actually taken by him on the writ of replevin is competent and conclusive evidence of that quantity in the trial of this action upon the replevin bond, and submitted to the court a prayer for a ruling to that effect.

The plaintiff contended that the statement of the officer in his return of the quantity of ice replevied being indefinite in the first return, and in the amended return being of weights taken at a different place from that at which the ice was replevied, and at subsequent times from that of the taking, was not evidence of the quantity of the ice replevied.

42 The court overruled the said prayer of the defendant in this respect, and ruled that neither of the returns were conclusive evidence of the quantity taken by the officer upon the replevin writ.

To which rulings the defendant then excepted.

It was admitted by the plaintiff that the damages which were assessed in the action of replevin for the taking and detention by the plaintiff in that action of the property replevied therein, with the interest thereon, and the costs recovered in that action, with interest thereon, have been fully paid, and that the judgment in that action awarding to the defendant in the same the sum of seven thousand seven hundred and twenty-three dollars and ninety-eight cents damages, and his costs of suit taxed at four hundred and twenty-seven dollars and sixty-seven cents, has been fully satisfied.

Thereupon the defendants contended that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value, at the date of the judgment in the action of replevin, and of the order therein that the property replevied be returned and restored to the said Nathaniel Webster, with interest
43 thereon. And they offered evidence to prove that the value of ice of like descriptions, character, intrinsic value, and quantity as that replevied at the place where the ice was replevied, and also at the place where the demand upon the writ of return was made, was less than ten thousand dollars at that time.

The court rejected the evidence offered, and overruled this prayer of defendant.

To which rejection of evidence and ruling defendant then excepted.

The defendant thereupon offered evidence to prove that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendants, The Washington Ice Company, upon the writ of return issued pursuant to the judgment in the action of replevin for a return of the goods replevied, viz., August 19th, A. D. 1878, and presented a prayer to the court for a ruling that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character, and intrinsic value as those replevied at the date of said demand.

But the court rejected the evidence offered, overruled this
44 prayer of the defendants, and ruled that the plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officer upon the replevin writ.

To which rejection of evidence and rulings the defendant then excepted.

The plaintiff contended that the finding of the value of the ice replevied by the jury which assessed the damages for taking the ice upon the replevin writ against the plaintiff in that suit, in answer to the question submitted to them in that trial, "What was the value of the ice replevied where it was situated at the time it was taken in this writ?" as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendant of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action, and moved the court for an entry of judgment against the defendant for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum.

45 The defendant resisted this motion, and contended that the value of the ice replevied was not a legal issue in the replevin action, and that they were not precluded from showing that the volue of the ice was less than the sum thus found, and that said

question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond.

And they further contended that if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action interest thereon should be cast only from the date of demand upon the writ of return and not from the date of that finding by the jury.

The court overruled the defendant's position, sustained the motion of the plaintiff, and ruled that the finding of value by the jury in the action of replevin was conclusive against the defendant, and ordered judgment to be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum, that being the amount of the said sum of twenty thousand and sixty-nine dollars and
46 thirty-three cents, with interest thereon from the date of said finding, May 14, 1875.

To which rulings of the court, order, and decision, and entry of judgment for damages, and each and every of them, defendants then excepted.

And inasmuch as the matters hereinbefore referred to, and said rulings, order, and decision, and entry of judgment for damages would not otherwise appear by the record of said cause the counsel on the part of the said defendant prayed the court to sign this bill of exceptions containing the several matters given and offered in evidence, and the rulings and decision of the court thereon, and the final order and entry of judgment therein, and the exceptions thereto, that the same may become a part of the record of said cause. All of which being found to be true, is allowed.

In witness whereof, I have hereunto set my hand, this eleventh day of October, in the year of our lord one thousand eight hundred and eighty-two.

NATHAN WEBB,
U. S. District Judge of Maine, and holding Circuit Court.

And the said defendant's bill of exceptions, so allowed and signed by the presiding judge, is then and there placed on file, and
47 the court enters a decision that the defendant does owe the plaintiff, and assesses damages in the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents ($28,990.14).

All which being seen and understood, it is therefore considered by the court here, to wit, on the tenth day of October, A. D. eighteen hundred and eighty-two, that the said plaintiff, Nathaniel Webster, recover of the said defendants, The Washington Ice Company, Sarah H. Drummond and William E. Gould, the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cent- ($28,990.14), and his costs of suit taxed at ——.

UNITED STATES OF AMERICA, }
District of Maine, } *ss:*

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing from pages 1 to 44, inclusive, contains a true and perfect copy of the record and of all proceedings in the cause Nathaniel Webster against The Washington Ice Co. *et als.*, determined in said circuit court at the September term thereof, A. D. 1882.

In testimony whereof, I have hereunto set my hand — affixed the seal of said court, this fourth day of October, A. D. 1884.

[SEAL.] A. H. DAVIS, *Clerk.*

48 UNITED STATES OF AMERICA, }
District of Maine, } *ss:*

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that I have annexed to the writ of error herein—The Washington Ice Co. *et al.*, in error, *v.* Nathaniel Webster—an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, and have returned the same with said writ; also a certified copy of said assignment of errors as required by section 997 of the Revised Statutes of the United States and the rules of the Supreme Court of the United States.

Witness my hand and the seal of the said circuit court, this 10th day of October, A. D. 1884.

[SEAL.] A. H. DAVIS, *Clerk.*

49 *Assignment of Errors.*

Supreme Court of the United States.

WASHINGTON ICE COMPANY, JOSIAH H. DRUMMOND & WILLIAM E. GOULD, Plaintiffs in Error,

vs.

NATHANIEL WEBSTER.

And now, to wit, on the second day of September, A. D. 1884, before the Justices of said Court come the plaintiffs, The Washington Ice Company, Josiah H. Drummond, and William E. Gould, and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error, to wit:

1. There was error in the ruling of said court admitting as evidence the following question and answer, to wit:

"What was the value of the ice replevied where it was situated at the time it was taken in this suit? Answer. Twenty thousand and sixty-nine dollars and thirty-three cents;" which question and answer were contained in the record of the judgment and of the proceedings of the court in the action of replevin, Nathaniel Webster *vs.* Washington Ice Company, in the supreme judicial court of the State of Maine, which judgment is dated May 4, 1878,

50 and is marked "Plaintiff's Exhibit C," in the bill of excep-

tions contained in the record, a transcript of which is annexed to this writ.

2. There was error in the ruling of said court rejecting the evidence offered by the defendants to show "that the value of the ice replevied was less than ten thousand dollars, at whatever time such value is to be assessed;" and in the rejection by the court of the prayer of the defendants for a ruling, as follows, to wit: "That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officers in that writ was commanded to replevy;" and in the ruling by the court "that the defendants are estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin, and in the replevin bond (being the bond in suit) at whatever time that value is to be assessed; and that the plaintiff was not precluded from showing that it was of greater value;" and in the ruling by the court that the plaintiff is not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars;" said writ being marked in said bill of exceptions "Plaintiff's Exhibit A," and said bond being marked in said bill of exceptions "Plaintiff's Exhibit E."

51 3. There was error in the ruling of said court rejecting the prayer of the defendants for a ruling, "that the statement of the officer who served the replevin writ, in his return thereon of the quantity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity in the trial of this action upon the replevin bond;" and in the ruling that neither of the returns of said officer, to wit, the original or amended return indorsed upon said writ of replevin, were evidence of the quantity of ice taken by the officers upon said replevin writ, which return and amended return are indorsed upon the writ which is marked in said exceptions "Plaintiff's Exhibit A."

4. There was error in the ruling of said court in rejecting the contention, motion, and prayer of the defendants for a ruling, "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value at the date of the judgment in the action of replevin, and the order therein that the property replevied be returned and restored to the said Nathaniel Webster, with interest thereon;" and in rejecting the evidence offered by the defendants "to prove that the value of ice of like description, character, intrinsic value, and quantity, as that replevied, at the place where

52 the ice was replevied, and also the place where the demand upon the writ of the return was made, was less than ten thousand dollars at that time."

5. There was error in the ruling of said court, rejecting the evidence offered by the defendants, "that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendant, The Washington Ice Company, upon the writ of return issued pursuant to the judgment in the action of replevin for return of the goods replevied, viz., Aug. 19, 1878," which

writ of return is marked "Plaintiff's Exhibit D" in said bill of exceptions, and in rejecting the prayer of the defendants for a ruling "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character, and intrinsic value as those replevied at the date of said demand;" and in the ruling of said court that "plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officers upon the replevin writ."

6. There was error in the ruling of said court in sustaining the position and prayer of the plaintiff for a ruling that "the finding of the value of the ice replevied by the jury which
53 assessed the damages for taking the ice upon the replevin writ, against the plaintiff in that suit, in answer to the question submitted to them in that trial, viz., 'What was the value of the ice replevied, where it was situated, at the time it was taken in this suit?' as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendants, of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action;" and also in sustaining the motion of the plaintiff "for an entry of judgment against the defendants for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum;" and in overruling the position and prayer for a ruling by the defendants, "that the value of the ice replevied was not a legal issue in the replevin action, and that the defendants were not precluded from showing that the value of the ice was less than the sum thus found, and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond;"
54 and in overruling the further position and prayer of the defendants, "that if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of the demand upon the writ of return, or from the date of the judgment for a return, and not from the date of that finding by the jury;" and in ruling "that the finding of value by the jury in the action of replevin was conclusive against the defendants;" and there was also error in the ruling and order of said court wherein it was ordered that "judgment be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum; that being the amount of said sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of said finding, May 14, 1875."

7. There was error in said court in giving judgment aforesaid for the plaintiff for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and there was also error in entering judgment for the penal sum of the bond.

55 And the said plaintiffs, The Washington Ice Company, Josiah H. Drummond, and William E. Gould, pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by the occasion of the said judgment.

By A. P. GOULD AND
JOSIAH H. DRUMMOND,
Attorneys for Plaintiffs in Error.

56 [Endorsed:] Washington Ice Co. *et als.*, plaintiffs in error, *v.* Nathaniel Webster. Assignment of errors. Maine district, *ss:* Office cl'k C. C. U. S. Filed Sept. 2, 1884. Attest: A. H. Davis, clerk.

57 *Assignment of Errors.*

Supreme Court of the United States.

WASHINGTON ICE COMPANY, JOSIAH H. DRUMMOND, & WILLIAM E. GOULD, Plaintiffs in Error,
vs.
NATHANIEL WEBSTER.

And now, to wit, on the second day of September, A. D. 1884, before the Justices of said Court, comes the plaintiffs, The Washington Ice Company, Josiah H. Drummond, and William E. Gould, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, to wit:

1. There was error in the ruling of said court admitting as evidence the following question and answer, to wit:

"What was the value of the ice replevied where it was situated at the time it was taken in this suit?

"Answer. Twenty thousand and sixty-nine dollars and thirty-three cents."

Which question and answer were contained in the record of the judgment and of the proceedings of the court in the action of replevin, Nathaniel Webster *vs.* Washington Ice Company, in the supreme judicial court of the State of Maine, which judgment is dated May 4, 1878, and is marked "Plaintiff's Exhibit C," in the bill of exceptions contained in the record, a transcript of which is annexed to this writ.

58 2. There was error in the ruling of said court rejecting the evidence offered by the defendants to show "that the value of the ice replevied was less than ten thousand dollars at whatever time such value is to be assessed," and in the rejection by the court of the prayer of the defendants for a ruling, as follows, to wit: "That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars, by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officers in that writ was commanded to replevy." And in the ruling by the court that "the defendants are estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin, and in the replevin bond (being the bond in

suit) at whatever time that value is to be assessed, and that the plaintiff was not precluded from showing that it was of greater value." And in the ruling by the court the plaintiff is not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars, said writ being marked, in said bill of exceptions, "Plaintiff's Exhibit A," and said bond being marked, in said bill of exceptions, "Plaintiff's Exhibit E."

3. There was error in the ruling of said court rejecting the prayer of the defendants for a ruling "that the statement of the officer who served the replevin writ, in his return thereon of the quan-
59 tity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity in the trial of this action upon the replevin bond," and in the ruling that neither of the returns of said officer, to wit, the original or amended return endorsed upon said writ of replevin, were evidence of the quantity of ice taken by the officer upon said replevin writ; which return and amended return are indorsed upon the writ, which is marked in said exceptions "Plaintiff's Exhibit A."

4. There was error in the ruling of said court in rejecting the contention, motion, and prayer, of the defendants for a ruling, "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value, at the date of the judgment in the action of replevin, and the order therein that the property replevied be returned and restored to the said Nathaniel Webster with interest thereon," and in rejecting the evidence offered by the defendants "to prove that the value of the ice of like description, character, intrinsic value, and the quantity as that replevied, at the place where the ice was replevied, and also at the place where the demand upon the writ of return was made, was less than ten thousand dollars, at that time."

60 5. There was error in the ruling of said court rejecting the evidence offered by the defendants, "that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendant, The Washington Ice Company, upon the writ of return issued pursuant to the judgment in the action of replevin for a return of the goods replevied, viz., August 19, 1878," which writ of return is marked "Plaintiffs' Exhibit D," in said bill of exceptions, and in rejecting the prayer of the defendants for a ruling "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character, and intrinsic value as those replevied at the date of said demand," and in the ruling of said court that "the plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officer upon the replevin suit."

6. There was error in the ruling of said court in sustaining the position and prayer of the plaintiff for a ruling that "the finding of the value of the ice replevied by the jury which assessed the damages for taking the ice upon the replevin writ against the plaintiff in that suit in answer to the question submitted to them

in that trial, viz: "What was the value of the ice replevied where it was situated at the time it was taken in this suit? as appears in the record of the proceedings in the action of replevin
61 is evidence in this action upon the bond, and is conclusive against the defendants of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action;" and also in sustaining the motion of the plaintiff "for an entry of judgment against the defendants for the same found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum;" and in overruling the position and prayer for a ruling by the defendants, "that the value of the ice replevied was not a legal issue in the replevin action, and that the defendants were not precluded from showing that the value of the ice was less than the sum thus found, and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond;" and in overruling the further position and prayer of the defendants, "that if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of the demand upon the writ of return, or from the date of the judgment for a return, and not from the date of that finding by the jury;" and in ruling "that the finding of value by the jury in
62 the action of replevin was conclusive against the defendants."

And there was also error in the ruling and order of said court wherein it was ordered that "judgment be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum, that being the amount of said sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of said finding, May 14, 1875."

7. There was error in said court in giving judgment aforesaid for the plaintiff for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages; and there was also error in entering judgment for the penal sum of the bond.

And the said plaintiff, The Washington Ice Company, Josiah H. Drummond, and William E. Gould, pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by the occasion of the said judgment.

By A. P. GOULD AND
JOSIAH H. DRUMMOND,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA, }
Maine District, } ss:

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing is a true copy of the original assignment of errors filed in the cause herein named on the second day of September, A. D. 1884.

Witness my hand and the seal of the said circuit court this tenth day of October, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. H. DAVIS, *Clerk.*

Endorsed on cover: Maine C. C. U. S. No. 1156. The Washington Ice Company, Josiah H. Drummond, and William E. Gould, plaintiffs in error, *vs.* Nathaniel Webster. Filed 22d October, 1884.

125-426

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 150.

THE WASHINGTON ICE COMPANY,
JOSIAH H. DRUMMOND, and
WILLIAM E. GOULD,
Plaintiffs in Error,

vs.

NATHANIEL WEBSTER.

In Error to the Circuit Court of the United States for the District of Maine.

PLAINTIFFS' BRIEF.

Printed at Opinion Office, Rockland, Maine.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 150.

THE WASHINGTON ICE COMPANY,
JOSIAH H. DRUMMOND, and
WILLIAM E. GOULD,
Plaintiffs in Error,

vs.

NATHANIEL WEBSTER.

In Error to the Circuit Court of the United States for the District of Maine.

PLAINTIFFS' BRIEF.

GENERAL STATEMENT.

This writ of error is brought to correct rulings, and the decision of a Circuit Judge, in the trial of an action of debt upon a replevin bond, wherein the plaintiffs in error were obligors, and the defendant obligee. (Record, page 4).

The case was tried by the Judge, a jury having been duly waived. (Record, page 7).

The bond is dated August 12, 1870, and is in the penal sum of $30,000.

The condition of it is as follows:

"The condition of the above obligation is such that, whereas the said The Washington Ice Co. have this day commenced against the said Nathaniel Webster an action of replevin, for a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain ice-houses situate in the town of Boothbay, in the County of Lincoln and State of Maine, owned or occupied by Nathaniel Webster, of Gloucester, in the County of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, which they say the said Nathaniel Webster has unlawfully taken:

Now, therefore, if the said The Washington Ice Company shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void; otherwise to remain in full force." (Record, page 18).

The replevin writ was dated August 12, 1870, and is correctly described in the bond. (Record, page 10).

The ice was replevied August 13, 1870; and the officer's first return was as follows:

"Lincoln, ss: August 13, 1870.

By virtue of this writ I have taken the ice within named as the property of the within named Washington Ice Company, and on the nineteenth day of August, A. D. 1870, I delivered said ice to Hiram Perkins, whom the Washington Ice Company designated as their agent to

receive said ice; and on the nineteenth day I summoned the within named Nathaniel Webster by reading this writ in his presence and hearing for his appearance at Court—the quantity replevied, by actual weight, being about twenty-five hundred tons.

(Record, page 10). THOMAS BOYD,

Dept. Sheriff."

He subsequently amended his return by leave of Court, stating the exact weight of the ice replevied by him to be "twenty-three hundred and thirty-one tons, and eighteen hundred and fifty-one pounds," and is as follows:

"Lincoln, ss: August 13, 1870.

By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice found by me in the ice-houses within mentioned, all of which said ice I caused to be weighed on delivery at the wharf in said Boothbay, about three miles from said ice-houses, being the nearest place thereto where ice could be shipped, twenty-two hundred and ninety-seven tons and nineteen hundred and twenty-one pounds of which was thus weighed on successive days, portions of it on each week day, between the twenty-third day of August, 1870, and the sixteenth day of September, 1870, and thirty-three tons and nineteen hundred and thirty pounds thereof was thus weighed on three several days, between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870; the whole of said ice thus taken by me weighing twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds; and on the nineteenth day of said August, 1870, I delivered all the said ice at said ice-houses to the plaintiff, reserving to myself authority to weigh the same; and on the nineteenth day of said August I summoned the within

named Nathaniel Webster to appear at Court as within directed, by reading this writ aloud in his presence and hearing.

(Record, page 10). THOMAS BOYD,
Dept. Sheriff."

The action of replevin was tried in the Supreme Judicial Court of Maine, Lincoln County, at the October term, 1871, on the general issue and a brief statement of title in the defendant and one David C. Babson, with a prayer by defendant for a return, and for the assessment of damages for the taking and detention of the goods, (Record, page 11); and was submitted to the full Court on a report of the evidence by the presiding judge. (Record, page 13).

June 26, 1874, an order was sent down by the full Court, that the plaintiff should be non-suited, judgment for the return of the goods replevied, damages for the taking and detention to be assessed at *nisi prius*, if defendant so elect, or he might if he prefer, resort to his remedy on the bond, pages 13, 14.

October term, 1874, the defendant elected to have his damages assessed by a jury. (Record, pages 13, 14). At the April term, 1875, the damages for taking and detention were assessed by a jury at $6,550. (Record, page 14).

The case was thereupon carried to the full bench upon report and exceptions, which were overruled, and judgment ordered for the plaintiff, which was entered of record at the April term, 1878, and the date of it is May 4th, 1878.

The record of the judgment, after reciting the proceedings in the case, concludes as follows:

"It is, therefore, considered and ordered by the Court,

that the property replevied be returned and restored to the said Nathaniel Webster irrepleviable, and that the said Nathaniel Webster recover against the said Washington Ice Company the sum of seven thousand seven hundred twenty-three dollars and ninety-eight cents damages for the taking and detaining the property replevied, being the amount of the verdict, with interest thereon to the date of this judgment; and also that said Webster recover his costs of suit taxed at four hundred and seventy-seven dollars and sixty-seven cents."

The judge who presided at the trial, for the assessment of damages for the taking and detention, for the purpose of getting a basis upon which to assess the damages according to the law in Maine, submitted to the jury the following question:

"What was the value of the ice replevied where it was situated at the time it was taken in this suit?" to which the jury made the following answer:

"Twenty thousand and sixty-nine dollars and thirty-three cents."

This question and answer were embraced in the record of the proceedings upon which the judgment was based. (Record, page 14).

The defendant objected to the admission of this question and answer at the trial of the suit on the bond. But the Court overruled the objection, and admitted the question and answer, to which the defendants excepted. (Record, page 16).

Upon the replevin judgment a writ of return and *fieri facias* was issued July 31, 1878. (Record, pages 16, 17).

Upon it a demand for a return of the ice was duly

made upon the Washington Ice Company August 19, 1878. (Record, pages 17, 18). The damages for the taking and detention together with the costs recovered in that judgment with interest thereon amounting to $8,379.36 were paid September 17, 1878. (Record, page 17).

The goods were not returned.

In this action upon the bond the defendants craved oyer, and pleaded that they had kept its several conditions therein set forth except the following, viz.: "And also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment;" and as to that condition they confessed that they had not kept it, and prayed that they might be heard by the Court in Equity in the assessment of damages for that breach. (Record, page 5).

By order of the Court judgment was entered for the plaintiff, for the penalty of the bond and that execution should issue for such sum as should thereafter be legally ascertained (page 6).

The cause for the assessment of damages for the breach of the condition of the bond confessed, was heard before Webb, Judge of the District Court, sitting as Circuit Judge.

The cause was thereupon heard, for the assessment of damages, before Webb, Judge of the District Court of Maine, holding Circuit Court, at the September Term, 1882, a jury having been duly waived. (Record, page 7).

The plaintiff introduced the record of the judgment, and of the proceedings of the Court, in the action of

replevin, dated May 4, 1878, containing a recitation of the facts and proceedings hereinbefore set forth. (Record, pages 12, 13, 14, 15).

He also introduced a copy of the original writ of replevin, with the officer's return thereon, and pleadings in the case. (Pages 9, 10, 11, 12).

He also introduced the writ of return dated July 31, 1878, with the satisfaction of the judgment for damages and costs, and the evidence of a demand for a return of the goods replevied, indorsed thereon (Record, pages 16, 17, 18); and the replevin bond (Page 18).

The plaintiff thereupon contended, that the defendants were estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin, and in the replevin bond, at whatever time that value is to be assessed, but that the plaintiff was not precluded from showing that it was of greater value.

The defendants contended that they were not thus estopped or precluded, and offered evidence to show, that the value of the ice replevied was less than ten thousand dollars, at whatever time such value is to be assessed; and submitted to the Court the following prayer for a ruling on this subject, viz.: That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officer in that writ was commanded to replevy.

The Court rejected the evidence offered, and overruled this prayer of the defendants, and ruled, that the defendants are estopped, as is contended by the plaintiff, and that the plaintiff is not precluded from showing that the

value of the goods replevied were more than fifteen thousand dollars.

To which rejection of evidence, and ruling, the defendant then excepted.

The defendant contended that the statement of the officer who served the replevin writ in his returns thereon of the quantity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity, in the trial of this action upon the replevin bond, and submitted to the Court a prayer for a ruling to that effect.

The plaintiff contended that the statement of the officer in his return, of the quantity of ice replevied, being indefinite in the first return, and in the amended return being of weights taken at a different place from that at which the ice was replevied, and at subsequent times from that of the taking, was not evidence of the quantity of the ice replevied.

The Court overruled the said prayer of the defendant in this respect, and ruled that neither of the returns were conclusive evidence of the quantity taken by the officer upon the replevin writ.

To which rulings the defendant then excepted.

It was admitted by the plaintiff that the damages which were assessed in the action of replevin for the taking and detention by the plaintiff in that action of the property replevied therein, with the interest thereon, and the costs recovered in that action, with interest thereon, have been fully paid, and that the judgment in that action has been fully satisfied.

Thereupon the defendants contended that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value, at the date of

the judgment in the action of replevin, and of the order therein that the property replevied be returned and restored to the said Nathaniel Webster, with interest thereon. And they offered evidence to prove that the value of ice of like description, character, intrinsic value, and quantity, as that replevied, at the place where the ice was replevied, and also at the place where the demand upon the writ of return was made, was less than ten thousand dollars at that time.

The Court rejected the evidence offered, and overruled this contention of defendant.

To which rejection of evidence and ruling defendant then excepted.

The defendant thereupon offered evidence to prove, that the value of the ice replevied, was less than ten thousand dollars at the time the demand was made upon the defendants, The Washington Ice Company, upon the writ of return issued pursuant to the judgment in the action of replevin for a return of the goods replevied, viz., August 19th, A. D. 1878, and presented a prayer to the Court for a ruling that the damages which the plaintiff is entitled to recover in this action, are, the value of the goods replevied, or of goods of like quantity, description, character and intrinsic value as those replevied at the date of said demand.

But the Court rejected the evidence offered, overruled this prayer of the defendants, and ruled that the plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officer upon the replevin writ.

To which rejection of evidence and rulings the defendant then excepted.

The plaintiff contended that the finding of the value of

the ice replevied by the jury which assessed the damages for taking the ice upon the replevin writ against the plaintiff in that suit, in answer to the question submitted to them in that trial, "What was the value of the ice replevied where it was situated at the time it was taken in this writ?" as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendant of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action, and moved the Court for an entry of judgment against the defendant for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum.

The defendant resisted this motion, and contended that the value of the ice replevied was not a legal issue in the replevin action, and that they were not precluded from showing that the value of the ice was less than the sum thus found, and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond.

And they further contend that if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of demand upon the writ of return, and not from the date of that finding by the jury.

The Court overruled the defendant's contention, sustained the motion of the plaintiff, and ruled that the finding of value by the jury in the action of replevin was conclusive against the defendant, and ordered judgment to be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages,

and that execution issue for that sum, that being the amount of the said sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of said finding, May 14, 1875.

To which rulings of the Court, order, and decision, and entry of judgment for damages, and each and every of them, defendants then excepted. (Record, pages 19, 20, 21).

SPECIFICATION OF ERRORS.

The plaintiff in error, relies upon and urges all the errors specified in the assignment of errors, which make a part of the record, beginning on page 22 thereof.

These errors are as follows:

(1) The Circuit Court erred in admitting as evidence the following question and answer contained in the record of the proceedings of the Court in the action of replevin to be found on page 14 of this record, viz: *Ques.* "What was the value of the ice replevied where it was situated at the time it was taken in this suit? *Ans.* Twenty thousand and sixty-nine dollars and thirty-three cents."

(2) There was error in the ruling of said Court rejecting the evidence offered by the defendants to show "that the value of the ice replevied was less than ten thousand dollars, at whatever time such value is to be assessed;" and in the rejection by the Court of the prayer of the defendants for a ruling, as follows, to wit: "That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officer in that writ was commanded to replevy;" and in the ruling

by the Court "that the defendants are estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin, and in the replevin bond at whatever time that value is to be assessed; and that the plaintiff was not precluded from showing that it was of greater value;" and in the ruling by the Court "that the plaintiff is not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars."

(3) There was error in the ruling of said Court rejecting the prayer of the defendants for a ruling, "that the statement of the officer who served the replevin writ, in his return thereon, of the quantity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity in the trial of this action upon the replevin bond;" and in the ruling that neither of the returns of said officer, to wit, the original or amended return indorsed upon said writ of replevin, were evidence of the quantity of ice taken by the officers upon said replevin writ.

(4) There was error in the ruling of said Court in rejecting the contention, motion, and prayer of the defendants for a ruling, "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value at the date of the judgment in the action of replevin, and the order therein that the property replevied be returned and restored to the said Nathaniel Webster with interest thereon;" and in rejecting the evidence offered by the defendants "to prove that the value of ice of like description, character, intrinsic value, and quantity, as that replevied, at the place where the ice was replevied, and also the place where the de-

mand upon the writ of return was made, was less than ten thousand dollars at that time."

(5) There was error in the ruling of said Court, rejecting the evidence offered by the defendants, "that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendant, "The Washington Ice Company," upon the writ of return issued pursuant to the judgment in the action of replevin for return of the goods replevied, viz., August 19, 1878;" and in rejecting the prayer of the defendants for a ruling, "that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character, and intrinsic value as those replevied, at the date of said demand;" and in the ruling of said Court that "plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officers upon the replevin writ."

(6) There was error in the ruling of said Court in sustaining the contention and prayer of the plaintiff for a ruling, that "the finding of the value of the ice replevied by the jury which assessed the damages for taking the ice upon the replevin writ, against the plaintiff in that suit, in answer to the question submitted to them in that trial, viz., 'What was the value of the ice replevied, where it was situated, at the time it was taken in this suit?' as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendants, of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action;" and also in sustaining the motion of the plaintiff "for an entry of judgment against the defendants for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars

and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum;" and in overruling the contention and prayer for a ruling by the defendants, "that the value of the ice replevied was not a legal issue in the replevin action, and that the defendants were not precluded from showing that the value of the ice was less than the sum thus found, and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond;" and in overruling the further contention and prayer of the defendants, "that if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of the demand upon the writ of return, or from the date of the judgment for a return, and not from the date of that finding by the jury;" and in ruling "that the finding of value by the jury in the action of replevin was conclusive against the defendants."

(7) There was error in the ruling, order, and decision of said Court wherein it was ordered and decided that, "judgment be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum; that being the amount of said sum of twenty thousand and sixty-nine dollars and thirty-three cents with interest thereon from May 14, 1875, the date of said finding;" and in entering of record judgment for that amount.

ARGUMENT.

The trial below was for the assessment of damages for the breach of the replevin bond which was confessed.

That breach was the failure to return the goods replevied according to the judgment of the Court in the replevin suit. All other conditions of the bond were fully performed.

The questions of law involved in the trial related to the rule of damages, and the legitimate evidence to prove them.

These questions are to be settled mainly by the Statutes of Maine, and the decisions of its Supreme Court construing those statutes, and settling the practice under them, and the principles of law governing the rights and liabilities of parties to actions of replevin in that State.

The action of replevin in this case was brought under the Rev. Stats. of Maine, (1857).

Chap. 96. *Section 8* provides, that, "When any goods, unlawfully taken or detained from the owner or person entitled to the possession thereof, * * * such owner or person may cause them to be replevied."

Section 10. "The officer before serving the writ shall take from the plaintiff, or some one in his behalf, a bond to the defendant, with sufficient sureties, in double the value of the goods to be replevied, conditioned as in the prescribed form of the writ, to be returned with the writ to the Court from which the writ issued, for the use of the defendant."

Section 11. "If it appears that the defendant is entitled to a return of the goods, he shall have judgment, and a writ of return accordingly, with damages for the taking and costs."

The writ in this replevin case was in the form prescribed by statute.

Laws 1821, Vol. 1, chap. 63, sec. 9.

The officer was in the writ commanded to replevy, "a certain lot of ice, being *about* 3,800 tons, lying and being in certain ice houses, situate in Boothbay, County of Lincoln," (p. 12).

In his first return, he certified, that he had "taken the ice within named, etc., * * * the quantity replevied by actual weight being about 2,500 tons," (p. 13).

This return was amended by leave of Court, in which he certified that he replevied all the ice *he found* in the ice houses described in the writ; which he caused to be weighed; and that "*the whole of said ice thus taken by me weighing 2,331 tons and 1,851 pounds*," (p. 14).

The plaintiff having been non-suited, the Court under the law of Maine, judicially settled, passed a preliminary order, that there should be judgment for a return of "the goods replevied," and that the defendant should, at his election, have his damages for taking and detention, assessed in the replevin suit, or resort to his remedy on the bond.

The defendant elected to have his damages assessed in the replevin suit, (p. 14).

They were so assessed at $7,723.98.

Thereupon judgment was entered against the plaintiff "that the property replevied be returned and restored to defendant;" and that he recover against the plaintiff the sum of $7,723.98 damages for the taking and detention of the property replevied, and his costs taxed at $477.67, (p. 14).

A writ of return and execution was issued to defendant according to the statute, which he caused to be duly served upon the plaintiff, who paid the judgment for damages and cost, with interest: $8,379.36; but did not return the goods replevied, (pp. 16, 17).

The amount replevied, and ordered to be returned, as appears by the judgment based on the officer's return, and the writ of return, was 2,381 tons and 1,851 pounds, (p. 16).

All claims which the defendant in replevin had against the plaintiff in replevin, accruing prior to the judgment of return, or the date of the demand of return, are satisfied.

Now, the only question is, what damages shall these plaintiffs in error pay for their failure to return the 2,381 tons and 1,851 pounds of ice to the defendant in error, when judgment for return was rendered, or demand made.

I. In a replevin suit in Maine, "if it appears that the defendant is entitled to a return of the goods, he shall have judgment, and a writ of return accordingly with damages for the taking and cost."

(Rev. Stats. 1871, chap. 96, sec. 11,—the statute in force at the time of the judgment).

"Damages for the taking," is construed to mean all damages resulting from the taking and detention of the goods.

In Maine, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his election, have the damages, which he has sustained by reason of the taking and detention of them to the time of the judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond; but he cannot have both.

If he elects to have his damages assessed in the re-

plevin suit, he can recover no damage accruing prior to the judgment in that suit, in his action on the bond.

Dillingham v. *Smith*, 32 Me., 182.
Same case, 33 Me., 384.
Thomas v. *Spofford*, 46 Me., 408, *411*.
Washington Ice Co. v. *Webster*, 62 Me., 341, *363*.
Stevens v. *Tuite*, 104 Mass., 328.

If there is any depreciation in the market value of the goods, between the taking and the date of the judgment of return, and the defendant elects to have his damages assessed in the replevin suit, if damage is collectable at all for such depreciation, it must be assessed in the replevin suit, as it is one of the elements of damage resulting from the detention of the goods.

Stevens v. Tuite, 104 Mass. 328, was decided under a statute similar to that of Me., and approved in Washington Ice Co. v. Webster, 62 Me.

It was an action upon a replevin bond, given in a suit in which the defendant had judgment for a return of the goods replevied, and his damages for taking and detention assessed. The goods were not returned. In respect to the elements of damage to be recovered in the replevin suit the Court say, (page 333) "The pecuniary loss and general inconvenience which the wrongful act of the plaintiff has occasioned to the other party, are to be recovered by the judgment for damages." It appeared, as Court say on page 334, that "the wrong to the original defendant was more than the mere detention of the property, and interruption of its use. * * His complaint is, that his cloth printing establishment was wrongfully broken up; his steam engine, machinery, fixtures and apparatus was taken down and carried away; and that returning the property or its equivalent in money,

will still leave him subject to the great expense, inconvenience and delay in the entire reconstruction of his works. It is manifest that the damages actually awarded him do not cover all the elements of damage which he was entitled to prove, and might have proved; and that the amount allowed him was for that reason inadequate as indemnity for the wrong that he has sustained. The difficulty in the present plaintiff's case lies in the fact that all these elements of claim are comprehended under the general head of damages recoverable in the original action. The time to prove his damages, and to have them assessed, in order to be included in the judgment, was when the replevin suit was before the Court and on trial. At that stage of the case, and for that purpose, he certainly was an actor or plaintiff, claiming compensation for the injury done him by the wrongful act of replevying his goods out of his hands. In contemplation of law, his claim for compensation, (independently of the return of the goods, or their equivalent in money, as secured by the bond), would be made up: (1) interest on the money value; (2) the general inconvenience and loss resulting from the interruption of his possession; and (3) the expense, trouble and delay attending the operation of replacing everything and restoring the establishment to its original condition. This is an entire and indivisible claim. He cannot recover part of it in one action, and subsequently maintain another action for the remainder." *

In this case, reported in 62 Me. following *Stevens* v. *Tuite*, on page 362 the Court say, "The damages, exclusive of the return of the goods or their equivalent in money, as secured by the bond, consists of interest upon the money value of the goods replevied, up to the time of the verdict, and any special damages shown to result directly from their taking, in addition to such interest.

* Approved in Barton Loan Co. v. Myers, 143 Mass. 446.

* * * The damages for detention may exceed the interest upon the value of the property replevied; as in case of the replevin of a horse, or oxen, the defendant would be entitled to the value of their use, or for what their services in use would be worth. * * * The damages are to be assessed to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein."

On page 364 Court say, "If the market value of the goods replevied should be less at the time of the demand on the writ of return, [or judgment of return] than when the goods are taken the loss must fall on the plaintiff;" but this must be assessed in the replevin suit, if defendant elect to have any damages assessed, as had been previously stated in the same opinion.

II. The ruling of the Circuit Court, in respect to the time when the valuation of the goods should be taken, was erroneous.

When damages for detention are recovered in the replevin suit, and the goods are not returned, the value of them is to be assessed in the action on the bond, either at the date of the judgment in replevin, or at the time of the demand on the writ of restoration.

The condition of the bond which was broken is, "and shall restore the same goods and chattels in like good order and condition as when taken, *in case such shall be the final judgment.*"

Until such judgment is rendered there can be no breach of this condition.

Upon the recovery of such judgment the plaintiff is bound to restore the goods, or pay their money value at that time. If he pays such a sum of money as will

enable the defendant to go into the market and buy goods of like description and value, he discharges his liability for that breach of the bond.

The rule laid down for the assessment of damages on the bond in this case by the Supreme Court of Maine, is as follows, "The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant, in a suit by him on the replevin bond, will be entitled to recover as damages, the value of the goods replevied at the date of the demand on the writ of return, with interest thereon, the damages and costs assessed in the replevin suit, and interest.

The assessment at the trial becomes important principally when the goods are *in esse* and may be returned on demand upon the writ of return; as, if they are not then assessed and the goods are returned and costs paid, the defendant has no further remedy on his bond. *Pettygrove* v. *Hoyt*, 11 Me., 66."

Washington Ice Co. v. *Webster*, 62 Me., 362, 363.

Pettygrove v. *Hoyt et als.*, was an action on a replevin bond. The breach was non-prosecution. The defendant recovered costs, but neglected to have a judgment for a return of the goods entered. The Court say, (p. 69) "the sureties are bound to perform what the *principal* was *adjudged* to perform or must pay damages as an equivalent, for performance. * * * But though the condition of the bond was violated, the question is, whether the present action is maintainable in the peculiar circumstances of the case; the judgment for costs having been satisfied, and no judgment for a *return* or for *damages* having been rendered."

The Court held the negative, and ordered a non-suit.

When our case was first reported to the Law Court, the opinion on which is contained in 62 Maine, it was agreed in the report, that, if the action was not maintainable the Court should determine how and when the damages should be assessed, and the rules of law which should govern the assessment. Therefore it is, that we find the rule of damages laid down to guide the assessment in both modes adopted in Maine; *first*, in case the assessment should be made in the replevin suit; *second*, in case the party elected to have all his damages assessed in the suit on his bond.

In the Opinion of the Court in this case reported in 68 Me., 449, on page 459, Court say, "By agreement of parties, the case was withdrawn from the jury to be reported to the full Court. If the action could not be maintained upon the evidence offered and introduced by plaintiffs, a non-suit was to be ordered; * * * and the Court was also authorized to pass upon the several propositions in respect to damages, made by defendant's counsel."

According to the practice in Maine, on the trial of a replevin action in which the title to the property is in contest, the usual course is to have the damages for the taking and detention assessed in the first trial, if the jury find that the property was in the defendant—the assessment of damages being contingent upon the finding of the jury that the defendant owned the goods replevied.

This is done to save the necessity of a second jury trial in the action of replevin. But the Court sometimes reports the evidence to the Law Court to determine whether upon it the action is maintainable as was done in this case.

In such case, if the Law Court decides that the action is not maintainable, it sends down an order directing a

non-suit, and that a judgment for a return shall be entered; and leaves it to the defendant to determine whether he will have his damages for taking and detention assessed before the final judgment in that suit is entered, or will allow judgment for return to be entered, and have his whole damages accruing both previous and subsequent to that judgment assessed in an action on his bond.

A paragraph on page 364, 62 Me., is obviously imperfect as considered in the light of what precedes, and what follows it, and of the decisions which are cited to support it. The paragraph is as follows: "When goods not held under legal process are replevied, and after entry of the action the plaintiff becomes non-suit and a return is ordered, but the goods replevied are not forthcoming on demand, the defendant in a suit on the bond is entitled to recover as damages, the value of the goods when taken, and interest thereon from the service of the writ to the time of the rendition of judgment.

Wood v. *Braynard*, 9 Pick., 322;
Thomas v. *Spofford*, 46 Maine, 408."

This paragraph is followed by, "So, where upon the evidence a non-suit has been ordered, without any assessment of damages, and the goods replevied are not restored upon demand, or on the writ of return, the defendant may recover the damages sustained, which are to be assessed upon the same principle as they would have been if a verdict had been rendered when the non-suit was ordered.

Dillingham v. *Smith*, 30 Maine, 370;
Smith v. *Dillingham*, 33 Maine, 384."

The rule governing *this* case, upon the hypothesis that

damages would be assessed in the replevin suit, had been previously given on page 363 as follows: "The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant in a suit by him on the replevin bond will be entitled to recover as damages, the value of the goods replevied *at the date of the demand on the writ of return* with interest thereon, the damages and costs assessed in the replevin suit, and interest."

The case cited to support the paragraph which we criticise is Wood v. Braynard, 9 Pick., 322, which was an action of replevin, and the only contention was in relation to the rule of damages to be assessed upon judgment of return for taking and detaining the goods replevied. The Court held it to be, "interest at six per cent on the value of the goods, from the service of the writ of replevin until the rendition of the judgment," in that suit. In this light the Court must have simply intended to say, that if damages for detention were assessed in a suit upon the bond for *detention*, the rule was interest upon the value of the goods when taken to the time of rendition of the judgment in replevin; otherwise the paragraph would be inconsistent with what preceded and what followed it, and the decisions referred to as well.

Thomas v. Spofford, 46 Me., 480, was also cited; but the only questions in that case decided were, that the value of the goods was not in issue in a replevin suit; and that the judgment should not contain it; and in a suit upon a replevin bond, the plaintiff is not estopped by the sum named in the bond, or the writ of restitution, as the value.

The paragraph which follows the one in question on the same page, (p. 364) clearly shows that its true meaning, is not what the words literally import. It is as follows:

"When at the time of the demand on the writ of return the goods replevied are not returned, if they shall then be of an increased market value, the defendant is equitably entitled to such increase. The damages in such case may be assessed up to the time when judgment was rendered on non-suit, as they would have then been by the verdict of a jury, if a non-suit had not been ordered. Then, the value of the goods replevied, or of goods of like description, *at the date of the demand on the writ of return* with interest, with the damages at the time of non-suit and cost and interest, will constitute the amount the defendant will be entitled to recover on his bond."

Tuck v. *Moses*, 58 Me., 461, is cited to this proposition, and fully supports it.

Take the whole opinion together in the 62d Me. the rules which the Court intends to give to govern the assessment of damages in the suit upon the bond, in case the defendant in replevin should elect to have his damages assessed in the replevin suit up to the date of that judgment, cannot be mistaken.

It is diametrically opposed to the rule given by the Judge of the Circuit Court.

Tuck v. Moses, 58 Me., 461, was an action upon a replevin bond. There was judgment in favor of the defendant in the action of replevin for a return of the property replevied, but no damages were assessed in that suit. In respect to the rule upon which the damages should be assessed in the action upon the bond the Court say, (p. 447), "The defendant's contract requires them to return the property, 'if such shall be the final judgment' of the Court. That contract was broken when, and *only* when, the judgment was rendered. If they do not return the property, the damage to the plaintiff would evidently

be its fair value *at that time*. This would be analagous to the law of damages growing out of the breach of ordinary contracts for the delivery of property."

In *62 Me., 362*, after stating that the damages are to be assessed in the replevin suit to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein, the Court say, "The measure of damages in trover is the value of the property at the time the right of action accrues, with interest thereon. *Robinson* v. *Barrows*, 48 Me., 188; *Pierce* v. *Benjamin*, 14 Pick., 356; *Kennedy* v. *Whitwell*, 4 Pick., 467. Such is the general rule as recognized in this State, and in Massachusetts."

In the Maine practice, the damages at the time of the trial of the replevin suit being assessed by a jury, and considerable time elapsing between the verdict and the judgment, damages accruing during that period for the detention are assessed by casting interest upon the verdict, as was done in this case.

In *Leighton* v. *Brown et al.*, 98 Mass., 515, it was held, that, "in an action on a replevin bond, judgment should be entered for the penal sum, and execution issue for the value of the property at the time of the refusal to return on demand, with interest thereon since."

The same rule prevails in New York.

Rawley v. *Gibbs*, 14 Johns., 385.

In other states, where the statutes are similar to those of Maine, the decisions are believed to be the same.

In some of the territories (as in Montana), and perhaps some of the states, the statutes provide that on the trial of actions to recover possession of personal property,

judgment for the plaintiff may be for the possession; *or* the value thereof in case a delivery cannot be had, and damages for the detention of it.

Under such statutes, the question of value may be determined in the action of replevin as in the case of Boley v. Griswold, 20 Wall., 486, and an alternative judgment is entered. Decisions under such statutes have no relevancy to the case at bar. The goods are not taken and retained by the plaintiff as under the Maine statutes; but are either not taken at all on the writ of replevin, or are returned by order of Court to the defendant on the stipulation to be accountable for their value, if the plaintiff prevails.

Morris on Replevin, 210.

Swift v. Barnes, 16 Pick., 194, is the leading case in New England on the rule of damages in suits on replevin bonds, which has been invariably followed since in Maine and Massachusetts. But it advances a doctrine of estoppel touching the mode of proving the value of the goods which will be considered hereafter.

In Parker v. Simonds, 8 Met., the Court made an exception to the general rule because the goods to be returned had no market value. They say (p. 212), "At the time of the demand, some of them had been sold; and others were deteriorated and much depreciated in value by further use. They were not all of them goods, like oil or other articles of merchandise, of a current market price; and some having been sold, and others thus deteriorated, the value at the time of the demand could not be ascertained; nor would that value be the measure of damages without a proper allowance for the depreciation, which, under the circumstances of this case, could not be computed upon any accurate data."

The Court therefore adopted the doctrine of estoppel advanced in Swift v. Barnes, and gave damages for the value set forth in the bond.

This exception has no application to the case at bar. Ice is an article of merchandise and always has a market value.

III. It was error in the Circuit Court, to apply to this case the doctrine of estoppel as set forth in the second assignment of errors.

The doctrine of estoppel as stated in *Swift* v. *Barnes*, and *Parker* v. *Simonds*, *supra* was based upon the identity of the goods described in the replevin writ, with the goods replevied.

It is the value of the goods *actually taken* on the writ of replevin which the plaintiff in replevin is accountable for, not the goods which the officer was commanded to take, unless they are identical.

It often happens that the plaintiff embraces a description of more property in his writ than the officer is able to find. In Maine the action of replevin is in the nature of a process *in rem*. It is the thing actually taken by the officer which is in litigation.

If he is commanded to take "about 3,800 tons of ice," and he finds in the place described only 2,500 tons, it is the 2,500 tons that is in litigation, not the 3,800.

Therefore it is, that if the plaintiff alleges that the 3,800 tons is of the value of $15,000, and the officer finds only 2,500 tons, the plaintiff is not precluded, on the judgment for return, from showing that the 2,500 tons was not of the value of $15,000. This would be a most unjust application of the doctrine of estoppel. At the present day it is never employed to exclude the truth.

When the plaintiff's writ in this case commanded the

officer to take 3,800 tons of ice; and the officer returned —not that he had taken the quantity of ice stated in the writ—but that, as in his first return, he found only about 2,500 tons, and in his amended return, made by authority of the Court before there was any assessment of damages in the replevin suit, for the purpose of having the quantity in litigation stated more accurately, that the whole of the ice taken by him, weighed but 2,331 tons, 1,850 pounds, there is no law of estoppel, which will preclude him from showing, that the smaller quantity is not, in the aggregate, of as much value as the larger quantity would have been, if he had found it. The valuation in the writ and bond, could, at most, be used only to show the value of the ice *per ton;* and estop the plaintiff from denying that the quantity replevied was of proportionate value to the larger quantity which he expected to find, and which the officer was commanded to replevy, but did not find.

This was the principle adopted in the assessment of damages by the Court in Smith v. Dillingham, 33 Me., 384, in an action on a replevin bond. The defendants had issued a replevin writ against the plaintiffs directing the officer to replevy 1,478 logs valued at $6,660. The officer returned that he had replevied 1,386 logs. The defendants in replevin prevailed. The writ of restitution was issued; demand made upon the plaintiffs who refused to return the logs. The action upon the replevin bond was defaulted, and the judge assessed the amount to be recovered by the plaintiff for the 1,386 logs at $6,245.44, which was done by averaging them with the 1,478 as described and valued in the writ of replevin and bond. As there was no assessment of damages in the replevin suit, the Court allowed as damages for detention interest on the value of the goods replevied.

It will be seen that the Court made use of the alleged

value in the bond by allowing a *pro tanto* value to the less quantity replevied.

It was not an application of the doctrine of estoppel, but an use of the alleged value of the logs described in the writ, as evidence, in the absence of other evidence, as to value.

This is a Maine precedent which would be followed by the Supreme Court of that state, if this action were pending there, and the valuation in the bond were the only evidence.

To create an estoppel as to the value of the goods replevied by a statement of their value in the replevin bond, the officer's return which is a part of the record upon which the judgment of return is based, must state that he has replevied the precise quantity that was described in the writ, because an estoppel must be certain to every intent.

If the officer's return is uncertain, or he returns a less quantity than was described in the bond, there is no estoppel; and in a suit on the bond the question of the value of the goods replevied is open to evidence.

Miller v. *Moses*, 56 Me., 128.

There the officer was commanded to replevy 1,329 cords of wood in various places. He returned that he [illegible] all the wood at the various places named in

[illegible] When the plaintiff's writ in this case commanded the

The Court say (p. 138), "The bond constitutes no estoppel. It ordinarily is given before the goods are replevied. It is based upon the writ, and assumes that what is ordered to be replevied, will be so replevied. But such may not be the case. The articles described in the writ and in the bond corresponding to the writ may not all be found, and, if not found, of course they cannot be replevied. The officer may find a part, and for those the bond will be security, and for no more. The amount thus replevied should appear in his return,—but if through the neglect of the officer, it does not so appear, the sureties are, nevertheless, not to be held liable to return what was never taken," and held the return uncertain, and the bond therefore no estoppel.

In the case at bar the statement of the quantity of ice to be replevied in both the writ and the bond was uncertain. They both described it as, "*about* 3,800 tons."

The officer in his first return certified that the quantity replevied by him was "*about* 2,500 tons." Here was too much uncertainty to found an estoppel upon; and (if it was the only return), in this suit on the bond the defendants, plaintiffs in replevin and their sureties, may prove by any competent evidence both the quantity and value of the goods actually replevied. The *amended* return may be conclusive of the quantity replevied. In such case it would appear that the quantity actually replevied was very much less, and of course of less value than the quantity and value stated in the bond. The defendants in the action on the bond would surely not be estopped to prove that 2,331 tons and 1,850 pounds of ice was not of so much value as 3,800 tons of the same quality would be. The value of such a commodity is necessarily based upon quantity.

IV. There was error in the ruling of the Circuit Court as to the effect of the officer's return of the amount of goods which he replevied.

If that return was specific it is conclusive of the quantity replevied, and in litigation in that suit.

It is well settled that the return of an officer, as to all matters which are properly the subject of his return is conclusive so far as it affects parties and privies to the process returned.

Baker v. *Baker*, 125 Mass., 7.

Slayton v. *Chester*, 4 Mass., 478.
[Service of Writ.]

Bott v. *Burnell*, 9 Mass., 96.

Same v. *Same*, 11 Mass., 163.
[Return of Levy.]

Bean v. *Parker*, 17 Mass., 591.
[Return of Arrest.]

Esterbrook v. *Hapgood et ux.*, 10 Mass., 313.
[Assignment of Dower.]

Brown v. *Davis*, 9 N. H., 76.
[Question fully Discussed.]

Morse v. *Smith*, 47 N. H., 476.
[Attachment.]

Campbell v. *Webster*, 15 Gray, 28.

Choppell v. *Hunt*, 8 Gray, 427.

Smith v. *Randall*, 1 Allen, 456.

Johnson v. *Stone*, 40 N. H., 197.
[Return of Levy on Personal Property.]

The same rule as to the conclusiveness of an officer's returns, is held in Maine.

Stinson v. *Snow*, 10 Me., 263.
[Service of a Writ.]

Harkness v. *Farley*, 11 Me., 491.

Chase v. *Gilman*, 15 Me., 64.

Craig v. *Fessenden*, 21 Me., 34.
[Return of Nulla Bona.]

Agry v. *Betts*, 12 Me., 415.
[Notice to Creditor.]

Grover v. *Howard*, 31 Me., 546.
[Return in a levy that appraisers were discreet and disinterested.]

Darling v. *Dodge*, 36 Me., 370.
[Return of attachment of property described conclusive.]

Hobart v. *Bennett*, 77 Me., 401, 404.
[Return of notice of sale on execution.]

When specific they are conclusive both upon the parties and their privies. If not according to the truth the remedy is upon the officer.

This doctrine applies with special force to an officer's return upon a replevin writ; because from it alone does the Court know what property is in litigation, and for what there is to be judgment for a return, if it appears that the defendant is entitled to a return of the goods.

It was recognized in Miller v. Moses, 56 Me., 128. The Court say of the judgment for a return (pp. 135, 136),— "This judgment could only refer to the wood actually replevied * * * and that was to be ascertained from the return of the officer by whom service was made."

What is to be returned? How are the obligors in the the bond to know? Only by the judgment of return, and the property described in the *writ* of return. That judgment and writ of return are conclusive upon all parties, if specific.

Both the judgment and the writ of return in this case were specific.

The writ recites that the plaintiffs in replevin "lately

replevied the goods and chattels following, to wit: Twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds of ice;" and after reciting the judgment of return commands the officer to, "forthwith return and restore the said property unto the said Nathaniel Webster." (Record, pp. 14, 15).

In issuing this writ, how did the Court ascertain the quantity of ice to be returned? It could only be done by reference to the *judgment* in the replevin suit. That judgment could only have reference to the quantity of ice in litigation; and this was determined by the officer's return, which by the direction of the Court had been made specific. That return is a legitimate and necessary part of the record of the judgment, because by it alone is the Court informed of the *res* before the Court for adjudication. This is the case in all proceedings *in rem*.

Under the statutes of Maine its Supreme Court holds that a replevin suit "is a process *in rem*." Miller v. Moses, *supra*, page 139.

In Tuck v. Moses, 58 Me., 474, the Court treats the officer's return, when specific as conclusive evidence of the quantity of goods for which the judgment of return is to be rendered; and carefully distinguishes between the effect of a return which is specific and one which is not.

The amended return is the only one which the Court could or did regard as the return governing the question of what was in litigation. It states the amount of ice replevied definitely. This is the gist of that return. In the suit on the bond the plaintiff cannot object to the validity of the mode of ascertainment of the quantity as being incompetent. That question was addressed to the discretion of the Court that allowed the amendment, and that discretion cannot be revised or impeached in this

action. The Court allowed or directed the amendment for the purpose of having a definite quantity for consideration, that being stated specifically; and the mode of ascertaining the quantity adopted by the officer being satisfactory to that Court is not revisable here. That was treated as the only return in the case, and the quantity stated by the officer as the thing in litigation. This appears, not only by the judgment, and writ of return in which the quantity to be returned must be stated for the information of the officer who is commanded to make the return, but is recognized in the opinion of the Court in the case as reported in 68 Me., on page 464. They there say, "The officer returned that he had 'replevied all the ice by him [me] found in the ice-houses within mentioned.'" This language is not in the first return, and was treated as showing that the officer's return did not necessarily embrace all the ice described in the replevin writ.

In *Miller* v. *Moses*, *supra*, on page 140, Court say that in a return which states that the officer took *about* so many cords of wood, no estoppel as to the amount is created by the judgment.

It was not only necessary for the officer's own protection that the amendment should be made, but it was the duty of the Court to require it, (if he had ascertained to his own satisfaction what the quantity was,) so that the Court might not proceed in uncertainty as to what was in litigation, and what it must direct the return of, if plaintiff failed in his action. No objection or exception was taken to its allowance.

In Pierce et al v. Strickland, 2 Story's Repts., 292, Judge Story holds that the Circuit Court has no authority to revise a decision of the State Court on a question of

amendment. On page 307 he says, "As to the amendment allowed to be made on the officer's return by the State Court, it appears to me that this Court has no authority to revise the decision of the State Court upon such a subject. It was incident to the exercise of the general jurisdiction of that Court, of the nature and extent and propriety of which the State Court was the exclusive judge." And on pages 308–9 he says, "It was the officer's duty to return a schedule or inventory of the goods with an appropriate description, so as to have them forthcoming, and identified, to satisfy the execution."

That was an attachment of goods; but *a fortiori*, the return on a writ of replevin should be made specific; and if an officer has not time or means of determining the amount at the place where he found the goods, it is his duty to make that ascertainment afterwards at such time and place, and in such manner, as he can best do it. If it cannot be done before he returns his writ, and therefore he makes a general return at first, but still having control of the goods which he has taken, it is his duty to make the ascertainment afterwards as definitely as possible, and amend his return giving the specific amount which he replevied.

Such was the course of the officer adopted in this case, approved of by the Court, and not here subject to criticism.

The amendment of the return was seasonably made—three years before the rendition of judgment in the action of replevin; not two years afterwards as in the case of the amended return referred to in Tuck v. Moses, 58 Me., on page 475.

The amendment was made April Term, 1875; judgment was recovered April Term, 1878. (Record, pp. 12 and 14).

In Tuck v. Moses the final judgment in the replevin suit was rendered November 18, 1865, (p. 463); and the amended return was filed in 1867 pending an action on the replevin bond, (p. 467). The Court held that it could not then affect the judgment in the replevin suit which was founded upon the first return.

In the case at bar, if it should be contended that the amendment was made after judgment of return, the answer is, that no *judgment* was rendered before the amendment was made. The order of the Court upon the decision on the question of ownership was simply a direction that when the final judgment was rendered, it should be for a return of the goods to the defendant, which could not be until after the damages were assessed, if the defendant elected to have them assessed in that suit. The judgment is *one* by the Statute—for "a return of the goods, a writ of return, and for damages and costs," (sect. 11, chap. 96). The distinction between an *order* as to what kind of judgment should be rendered in respect to title, and the rendition of the judgment after the adjudication of the damages, is to be observed.

Neither the value nor quantity of ice replevied was material on the trial of the question of title, which by direction of the Court was separated from the trial upon the question of damages to save the expense of the latter in case the Court should hold that the title was in the plaintiff. But after that question was decided for the defendant, and he elected to have his damages assessed in that suit, it became necessary for the Court to be informed of the quantity of ice replevied.

It was for this reason that under the direction of the Court the new return was made stating the quantity; whereupon the trial for the assessment of damages proceeded.

V. The first, sixth, and seventh specifications of errors will be considered together.

In the trial for the assessment of damages in the replevin suit, with reference to one of the modes, in Maine, of ascertaining the damages for detention of articles of merchandise of a current market price, like ice, the Court submitted the question to the jury, "what was the value of the ice replevied where it was situated at the time it was taken in this suit?" It was at the discretion of the jury whether to answer it or not, as it was no part of the legal issue in that trial. The jury is only bound to find the general verdict upon the legal issues presented, which they did in this case; and the Maine Court has often held that, if this was done, and special questions of fact are put to the jury to enable them in their deliberations to reach a verdict on the issue submitted, which they do not answer, the verdict is good. And the judge invariably instructs the jury, when such questions are put, that if they can agree upon a general verdict, but cannot agree upon the answer to the questions submitted, to return the general verdict; and upon such verdict judgment is entered.

The object of putting such questions is to enable the Court to determine whether the verdict is conformable to legal principles.

Smith v. *Putney*, 18 Me., 87, 91.

It is a method resorted to, not to determine any legal issue in the case, but to show the Court whether the jury found certain facts which were competent to sustain the verdict upon that issue. If ~~a wrong~~ *an* answer unfavorable to the verdict is given, but there is still other evidence sufficient to support the verdict independent of the

answers to the special questions, the verdict will be sustained.

Gordon v. *Wilkins*, 20 Me., 134, *138*.

(1) The value of the goods replevied was not an issue in the trial of the replevin suit; and it is no part of the judgment in that case. If it was, it has been paid.

Thomas v. *Spofford*, 46 Me., 408.

In that case the Court say, "In the action of replevin, the question of value [of the goods replevied] *does not arise as an issue*. The title and right of possession are the matters to be determined in the suit. * * * The value of the goods make no part of the declaration necessarily. It is only important as fixing the amount of the penal sum in the bond which the officer is required to take," (p. 411). And on page 410 they say, "The insertion of the value in the execution, by the clerk, cannot estop the party from proving the actual value at the time of taking, or the time of demand. The value of the goods is not stated in and makes no part of the judgment."

The question and answer were purely incidental to the trial of the case, not involving directly its merits, but appertaining to the mode of proceeding only. The only legal verdict which could be rendered in that trial was, by the very terms of the statute, the general verdict which they did return, viz., defendant's damages by reason of the taking and detention of the property.

Aside from the judgment of return and the costs nothing else is determined by the judgment. (See judgment, p. 15).

In Burden v. Shannon, 3 Gray, 387, Chief Justice Shaw on page 391 says, "A judgment or judicial determination

is conclusive, even between the parties, as evidence only of what is directly put in issue and tried, not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree," or judgment. And on page 392 he says, "It is only when a fact is specially put in issue, traversed and tried, that a verdict, and a judgment following it, are evidence against a party." This is cited and affirmed in Burden v. Shannon, 99 Mass., 200, *204*.

In Lea v. Lea, 99 Mass., 493, held that a decree dismissing a libel for divorce which may have been entered upon either of three grounds is not conclusive between the parties.

A fact which is necessary to be proved in order to maintain the action must be alleged in the writ.

The value of the goods replevied is not a fact necessary to be proved to enable the plaintiff to maintain his action, or the defendant to obtain his judgment for a return, and damages for taking and detention; because there are other modes of assessing damages for detention even of an article of commerce than by casting interest upon its value.

The authorities to support the proposition that it is not necessary to allege the value in the writ of replevin are numerous.

Thomas v. *Spofford*, *supra*, 409.

Litchman v. *Potter*, 116 Mass., 371, and cases cited in the opinion.

Blake v. *Darling*, 116 Mass., 300.

In *Gilbert* v. *Thompson*, 9 Cush., 348, it was held that "in an action of replevin for a piano a former judgment between the same parties in an action of trespass *quare clausum* in which taking away the same piano was

alleged, by way of aggravation, is not conclusive; as title to the piano was then only indirectly involved." The Court say, on page 349 "the law is well settled, that a judgment in a former action is conclusive only when the same cause of action has been once adjudicated between the same parties, or the same point has been put in issue *upon the record*, and directly found by the verdict of a jury."

The jury in the action *qu. cl.* in answer to a special inquiry by the judge when they returned their verdict declared that they had taken into consideration the title to the piano, and it appeared that the title to the piano was in testimony, argued by the counsel and embraced in the charge of the judge. Still the Court held that such special finding did not settle the title to the piano even between the same parties.

Eastman v. *Cooper*, 15 Pick., 276, 279; which contains a strong statement of the principles.

In King, admr., v. Chase, 15 N. H., 9, it is held that, "the judgment is conclusive only upon the matter which was directly in issue upon the former trial. By the matter in issue is to be understood, that matter upon which the plaintiff proceeds by his action and which the defendant controverts *by his pleadings*. Facts offered in evidence to establish the matter which is in issue, are not *themselves* in issue within the meaning of the rule, although they may be controverted on the trial."

In Lawrence v. Hunt, 10 Wend., 80, Court say that, "the judgment of a Court of competent jurisdiction *directly on the point*, is as a plea in bar, and as evidence in certain cases, conclusive between the same parties upon the same matter, directly in question in another Court or suit, but it is no evidence of a matter which comes collat-

erally in question merely, nor of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment."

In Howard v. Kimball, 65 Me., 330, the Court say, "To ascertain whether a former judgment is a bar to the present litigation, *the true* criterion is found in the answer to the question, *was the same vital point put directly in issue* and determined."

1 Greenleaf's Evidence, Secs. 528, 529, 530.

The leading case on this subject, decided in 1776, is *the Duchess of Kingston's* case, 20 Howell's St. Tr., 538; expressly adopted and confirmed in Harvey v. Richardson, 2 Gall., 229, and by this Court.

In that case it was held that, "neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction; *nor of any matter incidentally cognizable;* nor of any matter to be inferred by argument from the judgment."

It is the *judgment* upon an issuable fact, which may be introduced to prove that fact in a future trial between the same parties; not the facts produced to obtain that judgment, however they may be proved. The ~~quantity~~ value of the ice was not contained in the judgment in the case at bar, although the proceedings in the trial of the replevin suit show that the jury might have made use of the value in determining the damages for the detention of it. The record of the proceedings, or "judgment roll," may set forth the evidence on which the judgment was obtained, but that is no part of the judgment itself.

The record of the judgment simply contains the con-

clusions of the law upon the facts found by the court or jury.

Freeman on Judgments, Sec. 2.

Bouvier says, the judgment is "the decision or sentence of the law given by a Court of justice or other competent tribunal, as the result of proceedings instituted thereon for the redress of an injury." And *Freeman* says that it begins, as in this case,—"It is therefore considered and ordered by the Court." Sec. 46.

In the case at bar, the question and answer under consideration, although embraced in the "judgment roll," or what is termed in this case, the record of the proceedings of the Court, (Record, p. 12) is no part of the judgment, which is simply the conclusions of the Court upon those procedings. Although contained in the record of the proceedings, the answer to the question has no greater effect than if proved *aliunde*. The record only shows that it was a fact which may have been acted upon by the jury in finding the issue; and as we have shown, there is no *judgment* upon that fact.

When, in the cases cited, it is said that the facts found, to conclude the parties, must be put directly in issue, the *technical* issue made by the declaration and plea, or petition and answer, is meant. There is nothing in the plea, or in the brief statement, or in any issue joined in this case, about the *value* of the ice; and the finding of it therefore by the jury was purely *collateral* to, or *incidental* in the trial of the case.

This view is sustained in the opinion of the Court in Smith v. McCool, 16 Wall., 563.

That action was ejectment. A like action between the same parties for the same premises had been before

decided on a special verdict on which judgment was rendered for the defendant. Plaintiff brought another suit, and on the trial offered as evidence the special verdict in the former case, in which the fact was found, to prove the heirship of one of the parties under whom he claimed. The Court say, on page 563, "Under the circumstances we think the special verdict, and the proceedings upon it in the case in which the verdict was rendered [order of judgment adverse to the special verdict], may be regarded as not unlike a demurrer to evidence. In such cases there is an admission of record of all the facts proved. * * * The party demurring relies upon the law arising upon the facts thus presented. *The facts so spread on the record are never evidence for or against either party in another suit.*"

Though the fact of value was found in the case at bar, it does not enter into the judgment—is no part of it. It is therefore not *res adjudicata*,—not conclusive, or even *admissible* to show the value of the ice in the action upon the bond.

Packet Co. v. *Sickles*, 5 Wall., 580, was a suit to recover damages under a special contract set forth in the declaration. It was tried on the general issue. To support it plaintiffs gave in evidence the record of a former trial between the same parties, on the same contract, as alleged, for payments due when that action was brought, in which, plaintiffs had a verdict and judgment in their favor. The declaration in the former suit contained four counts; (1) special count on the contract, corresponding in all respects to that set out in the declaration in the present suit; (2) common count for use of the patent; (3) money had and received; (4) special count on the contract, in substance like the first, but with allegations

materially different respecting it. The Court say, on page 592, "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly *within the issue controverted* in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

It has been shown that the value of the ice was not in issue, and could not be adjudicated in the former suit, and that the judgment does not show it was.

In Aurora City v. West, 7 Wall., 82, on page 103 the majority opinion says: "Better opinion is that the estoppel where the judgment was rendered upon the merits, * * * extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings."

No ~~allegation of the~~ value was either alleged or denied in the case in bar.

(2) The answer of the jury to the question is not conclusive or admissible for another and conclusive reason. The finding was of the value of the ice at the time it was taken on the writ; but the plaintiff in this action is entitled only to the value at the time of the judgment of return—or of demand upon the writ of return; two periods of time separated by nearly eight years; and there may have been a wide difference in value at these two periods. Neither party therefore would be estopped by that finding.

ALBERT. P. GOULD,

Counsel for Plaintiffs in Error.

VI. — In any event the judgment is for too much. Interest was cast upon $20.069.83 from May 14, 1875; It should have been from May 4, 1878 the date of the judgment in replevin.

Note.

Examining numerous cases where the doctrine of estoppel is discussed and applied, we find no one in which it is held that a party is precluded from proving a fact, because the same fact was put in evidence, and found to be true, in a former trial where that fact, was not, and could not be determined by the judgement in the former case.

Courts instruct juries as to what facts would be sufficient to prove the issue; but as those facts are not themselves in issue the belief by the jury that such facts exist, and therefore find the issue as instructed, precludes neither party from contesting those facts in a future trial.

This must be especially true where the second suit is not for the same cause of action as the first.

In the case at bar, in the former trial the question at issue and decided was, damages for the detention of the ice to the time of that trial. This action is to recover damages for the non-return of the goods as subsequently adjudged by the court.

In the first case value was not in the issue. In this present one it is of the very essence of the issue.

See,

Cromwell v. County of Sac, 94 U. S. 351.
Davis v. Brown, id. 423.
Smith's Lead. Cases, 4th Am. Ed. Notes, p. 572 et seq.

1 Greenl Ev. Sects §38. §39, §23. §24.
1 Wharton Ev. Sects 765. 785. note 2. — 788. & 793

125-426

IN THE SUPREME COURT OF THE UNITED STATES.

No. 150. OCTOBER TERM, 1887.

WASHINGTON ICE COMPANY ET ALS.

v.

NATHANIEL WEBSTER.

BRIEF FOR THE DEFENDANT IN ERROR.

BENJ. F. BUTLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

WASHINGTON ICE COMPANY ET ALS.

PLAINTIFFS IN ERROR,

v.

NATHANIEL WEBSTER.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action of debt was brought in the United States Circuit Court for the District of Maine, by Webster, the defendant in error, against the Washington Ice Company, and the other plaintiffs in error, as principal and sureties of a certain bond or writing obligatory in the penal sum of thirty thousand dollars.

The condition of the bond is, "that, whereas the Washington Ice Company has on the day of its date commenced against Webster an action of replevin for a certain lot of ice, being about 3,800 tons, which they say said Webster has unlawfully taken; therefore if the Company shall prosecute said replevin to final judgment, and pay such damages and costs as Webster shall recover, and return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then such obligation to be void." (Bond, Rec., p. 18.)

Whereupon the plaintiffs in error prayed oyer of the conditions, which being read and heard, they, the then defendants, in their plea, say "they have kept the several conditions of said writing obligatory except the following, to wit: 'And also return and resto

the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment'; and as to this condition the defendants confess that they have not kept the same, and that final judgment has been rendered against them in the replevin suit in said condition mentioned for the return of the goods and chattels replevied therein, and that they have not returned the same to the plaintiff according to the requirement of said condition." (Rec., pp. 8–9.)

And, therefore, the then defendants submit to the judgment of the Court and pray that they may be heard by the Court in Equity in the assessment of damages for the breach of said last-mentioned condition.

The action was then continued until the term of said court holden in September, 1882. And the parties filed in writing the following stipulation: —

"The parties to the above-entitled action, by their attorneys of record, hereby stipulate and agree to waive a jury in the trial of the same, and that the issue of fact therein may be tried and determined by the Court."

The case came on for trial before the Court. The plaintiff, to provethe issue on his part, introduced the original writ in the action of replevin (Rec., p. 9), the officers return and amended return and the pleadings in the action, wherein the defendant says that he did not take the goods and chattels in the plaintiffs, writ and declaration mentioned, and for brief statement of special matter in defence says, "that at the time of the alleged taking, as set forth in the writ, the ice was not the property of the plaintiff, or any part thereof, nor had the plaintiff any right to the possession thereof, and that the defendant was in rightful possession thereof at the time of said alleged taking, and that the taking was wrongful from the lawful possession of the defendant by the plaintiff, and has ever since been unjustly and wrongfully detained by the plaintiff. And the defendant prays judment for the return of the ice in like good order as when the same was taken from the possession of the defendant, and for his damages for such taking and detention, and tendered an issue to the country, and the plaintiff did the like. (Rec., pp. 9, 10, 11.)

The defendant in error then produced the record of judgment,

and of the proceedings of the court in said action of replevin, whereby it appeared that at the term of the Supreme Judicial Court of Maine, holden in April, 1873, the issue thus framed was submitted to the jury; whereupon the plaintiff was non-suited, and the case was transmitted to the full court on the report of the evidence by the presiding Judge, and marked "Law," and transferred to the Supreme Judicial Court for the Middle District. That the same was continued *nisi*, and afterwards, in June, 1874, the Supreme Judicial Court for said district gave the following order: "Non-suit to stand; judgment for the return of the goods replevined; damages to the time of taking to be assessed at *nisi prius* if the plaintiff so elect, or may, if he prefer, resort to his remedy on the bond." (Rec., pp. 13, 14.) The case was presented to the Supreme Court of Maine at the law term argued at length upon many questions. See decisions Washington Ice Co. *v.* Webster, 62 Maine Report, 341.

Among these are the following: Shall non-suit ordered at *nisi prius* stand, and ought the presiding Judge then to have granted the defendant's motion to proceed to have the damages assessed for the taking and detention of the ice by the jury after the non-suit had been ordered?

The case was then continued to the October Term, 1874, when the defendant elected to have his damages assessed by a jury. The case was again continued until the April Term, 1875, and was then tried by a jury. The Supreme Court had decided in the case that the measure of damages for the detention of the replevied property (unless some special damage was claimed) was the interest on the proper value of the property when replevied to the day of the verdict.

The presiding Judge at *nisi prius* so directed the jury, and in order to have the measure of damages ascertained, framed the questions which follow, to which he directed the jury to make answers, and that they were to find as damages for the detention, the interest on the amount at which they found the value of the property when replevied, casting interest upon that basis to the day of the verdict.

Their verdict was as follows: That the defendant was damaged by reason of the taking of the property replevied in the suit, and assessed damage for the defendant in the sum of six thousand

five hundred and fifty-five dollars. And the jury returned answers to the questions submitted as follows: —

First. What was the value of the ice replevied where it was situated at the time it was taken in this suit?

Answer. Twenty thousand and sixty-nine dollars and thirty-three cents.

Second. What damage did the defendant sustain by reason of the taking of the ice in repleving on account of the preparations he had made to remove it?

Answer. Eight hundred and thirty-five dollars and twenty-five cents.

Thereupon the plaintiff filed exceptions to the rulings of the Judge in matters of law, which were allowed and signed by the Judge.

And the plaintiff moved to set aside the verdict, because it was against law and evidence, and the evidence was reported to the law court.

The same was then marked "Law on exceptions and report," and transferred to the Supreme Judicial Court for the middle District. (Rec., pp. 14–15.)

Afterwards, on the 10th day of June, 1878, the following order was entered in said court: "Motions and exceptions overruled."

See decision Washington Ice Company v. Webster, 68 Maine R. 449.

Whereupon it was ordered by the Court that the property replevied be returned to Webster irrepleviable, and that Webster recover against the Company the sum of seven thousand seven hundred and twenty-three dollars and ninety-eight cents damages for the taking and detaining of the property replevied, being the amount of the verdict with interest thereon to the date of this judgment; and that he recover his costs.

Execution issued for the amount of said judgment, which was paid said Webster, and receipted for September 17, 1878. But the receipt was not to affect any further claim of Webster for the ice named in the writ, or for further damages or costs that may be recovered or recoverable by said Webster. (Rec., p. 17.)

Upon the evidence the plaintiff contended that the finding of the value of the ice replevied by the jury which assessed the

damages for taking the ice upon the replevin writ against the plaintiff in that suit, in answer to the question submitted to them at that trial, "What was the value of the ice replevied where it was situated at the time it was taken in this writ?" being required by the Court, in order to find a value of ice at the time or place of taking on which the jury could compute the interest as damages for the detention, is conclusive against the defendant of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action, upon chancelling the bond, and moved the Court for an entry of judgment against the defendants for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding.

On the 12th day of October, 1880, the plaintiff in error filed the following under the provisions of the Statutes of Maine, which is in the words following: — (Revised Statutes of Maine, Chapter 82, Section 21.)

"In any personal action, the defendant may, in writing, entered of record with its date, offer to be defaulted for a specified sum. If accepted, interest may be added from that date to date of judgment. If not accepted within such time as the Court orders, it shall not be offered in evidence or have any effect upon the rights of the parties or the judgment to be rendered, except the costs. If the plaintiff fails to recover a sum as due at the time of the offer greater than the sum offered, he recovers such costs only as accrued before the offer, and the defendant recovers costs accrued after that time; and his judgment for costs may be set off against the plaintiff's judgment for debt and costs."

"And now said defendant's come and offer to be defaulted, and that judgment may be rendered against them for the sum of sixteen thousand dollars and legal costs, and that execution may issue against them for the same."

There is no order of the Court that said offer be accepted.

On the 10th day of October, 1882, judgment was rendered in favor of Webster against all the defendants for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents.

A writ of error was there upon sued out on the 2d day of September, 1884.

The citation issued September 12, 1884.

A bond was signed and approved on the 10th and filed on the 13th day of September, 1884. The writ of error was filed in this court on the 22d day of October, 1884.

An assignment of errors, seven in number, is filed.

First. The Court erred in admitting as evidence the question to and answer by the jury as to the value of the ice replevied at the time and place where it was taken.

Second. In rejecting evidence offered by the defendants tending to show that the value of the ice replevied was less than ten thousand dollars at what ever time such value is to be assessed; and in the rejection of the prayer of the defendant for a ruling that they are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars, by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officers in that writ were commanded to replevy; and in the ruling that the defendants are estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin and in the replevin bond, being the bond in suit; and that the plaintiff was not precluded from showing that it was of greater value; and that the plaintiff was not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars.

Third. In rejecting the prayer of the defendants for a ruling that the statement of the officer who served the replevin writ, in his return thereon of the quantity of goods actually taken by him on the writ of replevin, is "competent and conclusive evidence" of that quantity in the trial of this action upon the replevin bond; and in the ruling that neither of the returns of said officer upon said writ, original or amended, were evidence of the quantity of the ice taken by the officer upon said replevin writ.

Fourth. In rejecting the contention, motion, and prayer of the defendant for a ruling that the damages which the plaintiff was entitled to recover in this action are the value of the goods replevined, or of goods of like description, character, and intrinsic value at the date of the judgment in the action of replevin, and the order therein that the property replevied be returned and restored to Webster with interest thereon; and in rejecting the evidence offered by the defend-

ants to prove that the value of ice of like description, character, intrinsic value, and quality as that replevied, and also the place where the demand upon the writ of the return was made, was less than ten thousand dollars at that time.

Fifth. In rejecting the evidence offered by the defendant that the value of the property replevied was less than ten thousand dollars at the time the demand was made upon the defendant, upon the writ of return issued pursuant to judgment, to wit, in August, 1878, and in rejecting the prayer of the defendants for a ruling that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevined, or of goods of like quantity, description, character, and intrinsic value as those replevied; and in the ruling of said Court that the plaintiff is entitled to recover the value of the ice replevied at the time it was taken by the officers upon the replevin writ.

Sixth. In the ruling of said Court sustaining the position and prayer of the plaintiff for a ruling that the fining of the value of the ice replevied by the jury which assessed the damages for taking the ice upon the replevin writ, against the plaintiff in that suit, in answer to the question submitted to them in that trial, viz.: "What was the value of the ice replevied where it was situated at the time it was taken in this suit?" as appears in the record of the proceedings of the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendants of the value of the ice in determining the amount which the plaintiff is entitled to recover in this action; also in sustaining the motion of the plaintiff for an entry of judgment against the defendant for the sum found by the jury in answer to that question, with interest thereon from the date of that finding. In overruling the position and prayer for a ruling by the defendants, that the value of the ice replevied was not a legal issue in the replevin action, and that the defendants were not precluded from showing that the value of the ice was less than the sum thus found, and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond; and in overruling the further position and prayer of the defendants, that if the finding of value in the action of replevin furnished the rule of damages to be assessed, interest should be cast only from the

date of demand upon the writ of return or from the date of the judgment for a return, and not from the date of that finding by the jury; and in the ruling that the finding of value by the jury in the action of replevin was conclusive against the defendants; and there was also error in the ruling and order of said Court wherein it was ordered that judgment be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum, that being the amount of said sum of twenty thousand and sixty-nine dollars and thirty-three cents with interest thereon from the date of said finding, May 14, 1875.

Seventh. There was error in said Court in giving judgment for the plaintiff for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and there was also error in entering judgment for the penal sum of the bond.

These several assignments of error merge themselves into two questions: —

First: Is the ruling of the Court that the finding by the jury of the value of the ice, in answer to the question submitted to them by the former Court, to find what was the value of the ice replevined where it was situated at the time it was taken in this suit, on which to calculate the interest as damages for the detention of the ice from the taking to the date of verdict, admissible and conclusive between the same parties in this suit?

Second: Are sureties on a replevin bond, two of the defendants in this action, concluded by the finding of facts by the former jury on trial of the replevin suit, equally with their principal?

If these rulings can be maintained, then all the other assignments of error need no consideration. If the two questions above set forth are not answered affirmatively, a new *venire* must be ordered.

Upon the first question we understand the rule to be that any fact found in a Court of justice, either of law or equity, of competent jurisdiction, by a verdict or decree, forever after concludes the parties as to that fact so found when judgment has been entered in accordance with such finding.

When the fact so found is not the exact issue between the parties, but the verdict and the judgment necessarily involve the consideration and examination of such question of fact, and a verdict

could not have been entered in the former suit without deciding that question, the fact so found becomes equally conclusive on the parties as any other fact of the issue thus found, as are facts found in a *special* verdict.

U.S. *v.* Beverly, 1 How., 134
Aspden *v.* Nixon, 4 How., 467.

If a verdict be had on the same point and between the same parties, it may be given in evidence though the trial were not had for the same land, for the verdict in such case is a very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the present jury.

Sherwin *v.* Clarges, Buller's N.P., 232.

It is not necessary that the fact to be proved by the record should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of such verdict.

1 Stark. Ev. (4th Am. Ed.), 200.
Eastman *v.* Cooper, 15 Pick., 285.

A question properly involved, and which might have been raised and determined in a former case, is barred by the decision therein.

Stockton *v.* Ford, 18 How., 418.
Aurora City *v.* West, 7 Wall., 82.
Washington Steam Packing Co. *v.* Sickles, 24 How., 341.

The judgment of a Court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. It must appear, either from the record or from intrinsic evidence, that the precise question was raised and determined in the former suit.

Russell *v.* Place, 94 U.S., 606.
Packing Co. *v.* Sickles, 5 Wall., 580.
Lea *v.* Lea, 99 Mass., 493.
Burlen *v.* Shannon, 99 Mass., 200.

Adjudication of the same subject-matter in a State Court is conclusive on this Court.

Ingraham *v.* Dawson, 20 How., 486.
Nations *v.* Johnson, 24 How., 195.

Matters adjudicated at law cannot be again reheard in equity between the same parties.

Bigelow on Estoppel, 114, 115, 197.
Hendrickson *v.* Norteross, 4 C. E. Green (N.J.), 417.
Low *v.* Mussey, 41 Vt., 393.

Matters adjudicated in equity are conclusive everywhere between parties.

Franklin *v.* Green, 2 Allen, 519.

Upon the second question, which does not seem to be specifically raised in the assignment of errors: How far sureties upon bonds are bound by the facts judicially found in proper courts against their principals, we assume the rule to be that the finding of facts binds sureties as parties, because they become parties by agreement, and this has been held specially to be the case in the matter of replevin bonds.

Drummond *v.* Trest, 12 Wheat., 515.
Stover *v.* Banks, 10 Wall., 583.
Babbitt *v.* Finn, 101 U.S., 7.
Douglas *v.* Douglas, 21 Wall., 98.
Sweeney *v.* Loome, 22 Wall., 208.

It will be observed that the answer to the first question, "What was the value of the ice at the place and time it was taken?" was $20,069.33.

"The answer to the second question, "What damage did defendant sustain by reason of the taking of the ice in replevin, on account of the preparation he had made to move it?" was $835.25.

The verdict of the jury assessed the damages for detention at the sum of $6,555.

Compute interest at 6% on $20,069.33, from August 13, 1870, date of taking, to May 14, 1875 (Rec., p. 14), day of verdict, and

it is found to be $5,719.75, which is exactly even months' interest on the value of the ice found by the jury for detention thereof from the day of taking to the day of verdict. Add the amount, in answer to second question, $835.25, and you have the assessment of damages by the jury, $6,555, in exact conformity with the instructions of the Court.

Thus it is seen that without the finding of the value of the ice at the time and place where it was taken, as directed by the Court, it would have been impossible for the jury to find a verdict as instructed, to wit: to assess the interest on the value of the ice as found by them at the time and place of taking as damages for its detention.

All of which is respectfully submitted.

BENJ. F. BUTLER,
of Counsel.

25-126

Supreme Court of the United States.

OCTOBER TERM, 1887.

WASHINGTON ICE COMPANY AND ALS., IN ERROR,

vs.

NATHANIEL WEBSTER.

PLAINTIFFS' REMARKS UPON DEFENDANT'S AUTHORITIES.

ALBERT P. GOULD,
Counsel for Plaintiffs in Error.

Judd & Detweiler, Printers.

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United States *vs.* Beverly, 1 How., 134, does not sustain the defendant's proposition.

In that case the facts in controversy were specifically adjudged in the previous case of Peter *vs.* Beverly. (10 Peters, —.) The question in both cases was whether certain real estate should be sold to pay debts, which was resisted upon two grounds: *first*, that there was sufficient personal property; and, *second*, that some of the debts claimed were not due.

The whole subject-matter sought to be litigated in the second suit was embraced in the pleadings of the first.

The court cited Hopkins *vs.* Lee, 6 Wheaton, 108, which is adverse to the defendant's proposition.

This Court there says, "It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be again contested between the same parties. * * * But as to points which came only collaterally under consideration, or were only *incidently under cognizance*, or could only be inferred by argument from the decree, it is admitted that the rule does not apply." (Pp. 113, 114.)

In Aspden *vs.* Nixon, 4 How., 467, held that "a decree made in the High Court of Chancery in England, in a suit wherein an administrator appointed there is complainant, and an executor of an heir qualified there is defendant, does not estop an administrator appointed in Pennsylvania from suing the same executor qualified in Pennsylvania upon the same title asserted in the English bill, the subject-matter of the first suit being assets in England, and of the second assets in Pennsylvania." On page 498 the Court say, "A judgment or decree set up as a bar by plea or relied on as evidence by way of estoppel to be conclusive must have been made: 1st, by a court of competent jurisdiction upon the same subject-matter; 2d, between the same parties; 3d, *for the same purpose.*"

In the case at bar the finding of value by the jury in the action of replevin was not for the same purpose as that for which it is now sought to be used in the suit on the bond. The first was to get a basis for the ascertainment of a portion of the damages for the detention; the present purpose is to ascertain what sum of money shall be paid for the ice at a valuation taken eight years afterward.

1 Starkie Ev., 200, simply states the general proposition, but cites in a note Smith *vs.* Sherwood, 4 Conn., 276, where it is held that it is necessary, in order to constitute an estoppel by former judgment, that the precise point which is to create the *estoppel should have been put in issue and decided;* and this must appear from the record alone."

Eastman *vs.* Cooper, 15 Pick., 276, is a strong case against the proposition which it is cited to support. In that case it was held that, in order to constitute an estoppel, the precise point must be put in issue on the record and directly found by the jury and *adjudicated by the judgment;* and cannot be extended to collateral facts. (P. 280.)

In Stockton *vs.* Ford, 18 How., 418, the question was the

plaintiff's right to charge an estate with fees and costs due to him. His title to the estate had formerly been adjudicated and decided against him.

Court held that that was his opportunity for asserting his present claim.

Aurora City *vs.* West, as we have said in our brief, recognizes the principle that the doctrine of estoppel extends only to the material allegations contained in the pleadings, and gives no countenance to the proposition that the finding of a fact by the jury to support the issue, which fact itself is not determined by the judgment, precludes the inquiry into the same fact in a future suit.

Washington Steam Packet Co. *vs.* Sickles, as reported in 24 How., is sufficiently explained in our comments on the same case, reported in 5 Wall.

In Russell *vs.* Place it is obvious from the whole discussion of the Court that it intends to apply the doctrine of estoppel as to such matter only as was put in issue and adjudicated by the Court in a former case, not merely to matters of fact produced to support the issue, as is claimed by the defendant in the action at bar.

The same may be said of the case of Lea *vs.* Lea, 99 Mass.

Burlen *vs.* Shannon, 99 Mass., was an action on account for board of the wife of defendant. Defense, that defendant was lawfully divorced in Indiana. The Court ruled that the plaintiff was estopped from impeaching the divorce, and directed a verdict for the defendant.

"Held: A verdict and judgment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered. At the trial, with a jury, of a libel for divorce, their special findings on questions of fact are not conclusive of facts not essential to, although consistent with, their general verdict and the decree entered thereon."

There is no obscurity in the law as to how far sureties upon replevin bonds are bound by facts judicially settled against their principal. The *judgment alone* against the plaintiffs in replevin is binding on them. They agree to see to it, that their principal performs or satisfies it. Such is their contract; and their liability rests in contract only. They are not parties to the proceedings by which that judgment is obtained. They have no voice in the prosecution of that suit, or in defending the claim for damages for detention of the goods. They are not bound by the acts of their principal in that trial, either of omission or commission. If he fail to make a proper defense, and large damages are assessed they are affected only by the consequent increase of the judgment, and are not bound by any unjust estimate of the value of the goods which may be made by the jury in their assessment of the damages for their detention, because they had no opportunity to contest or impeach the evidence upon which the jury acted. To that hearing they are neither parties nor privies, so as to be precluded by the finding of any fact incidental to the trial. They are precluded only from denying the validity of the judgment. As to the sureties, the "proceedings" in a replevin trial are *res inter alios acta*. The judgment is admissible against them only to prove the fact of its rendition—not to prove matters of fact recited in it; "for there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it."

1 Greenl. Ev., sections 538, 539.

Only the parties to the suit can be affected by such matter.

Under the term parties the law only includes those who "had a right to make defense or to control the proceedings and to appeal from the judgment."

1 Greenl. Ev., section 523.

That the sureties are only bound to perform the judgment of the court, and can be no otherwise affected by the proceedings, is well illustrated by the case Douglass *vs.* Douglass, 21 Wall., 98, cited by defendant's counsel. That was an action on replevin bond. In the replevin suit the defendant had judgment for a return, and a writ of return was issued, upon which the officer took the goods and tendered them to the defendant in replevin. He refused to receive them because they were then in a changed and damaged condition.

The bond was upon this condition, "that if the said Douglas shall and will return the goods and chattels in said declaration mentioned, if the same be adjudged, and in all things abide and perform the judgment of said court, then the above obligation to be void."

The plaintiff in the suit on the bond contended that he was not bound to receive the goods in a damaged condition, and that he could recover on his bond for their deterioration. This Court held that as there was no such condition in the bond he could not recover such damages in a suit on it.

On page 104, the Court say:

"As soon as the property was taken by the marshal the efficiency of the bond, touching its return, was at an end. The bond stipulated for a return of the property and nothing more in relation to it. We cannot interpolate what the contract does not contain. Our duty is to execute it as we find it, and not to make a new one."

In the case at bar the only condition of the bond which was broken is that the plaintiff in replevin shall "return and restore the same goods and chattels * * * in case such shall be the final judgment." (Record, p. 18.)

The only portion of the final judgment which has not been performed is "that the property replevied be returned and restored to the said Nathaniel Webster." For this breach nothing proved, and no fact found by the jury, in the trial of the replevin suit, can affect the sureties on the bond.

The case of Sweeney *vs.* Lomme, 22 Wall., cited by defendant, was under the Montana statute authorizing an assessment of the value of the goods at the time they were taken in replevin, and has no pertinency to the case at bar.

No authorities cited by defendant's counsel support his proposition, that the sureties on the bond in this action are bound by the finding of the value of the ice by the jury in the replevin suit.

He says they became parties to the replevin suit by agreement. They only became parties to an agreement, with a specifically limited liability, to see that their principal returns the goods, "in case such shall be the final judgment."

Drummond *vs.* Preston (cited by counsel as Drummond *vs.* Trest), 12 Wheat., 515, was an action upon a guaranty that a debtor should pay all debts contracted by him with certain parties. The amount thus guaranteed was ascertained by a judgment against the debtor, which was held conclusive against the guarantor. This is simply the general principle, that a guarantor of debts to be contracted by a third party is precluded from questioning the amount of the debts, if it is judicially determined in a suit by creditor against debtor where there is no fraud.

Stover *vs.* Banks (10 Wall., 583) was an action on an administrator's bond. By a previous decree it was adjudged that the administrator had assets in his hands which he was ordered to distribute to the heirs. Failing in this, the sureties on his bond were held to be precluded from contesting the amount ascertained by the previous decree. There is no analogy between this class of cases and the one at bar. The sureties of an administrator become responsible for all his defaults—an undertaking upon his entering the office. The same principle applies as in the case of sureties upon all official bonds. Judgment against the principal binds the sureties, because they had undertaken by contract that the officer should perform his duty in conformity with law.

Babbitt *vs.* Finn, 101 U. S., 7, was an action upon a *supersedeas* bond given on an application for a writ of error. Judgment below being affirmed, the sureties were held liable to pay it. This is just what they agreed to do.

How these cases tend to establish defendant's proposition we are not able to perceive.

The sureties, Drummond and Gould, undertook that the Ice Company should return the goods replevied in like good order and condition as when taken, *if such should be the final judgment.*

The damages resulting from their detention having been assessed in the replevin suit, which must necessarily have embraced any deterioration or change of condition of the goods, the judgment required their return only, not their return " in like good order and condition," as it would have required if the defendant in replevin had elected to have his damages for detention assessed in a suit on his bond.

All other requirements of the judgment having been complied with the only liability of the sureties now is to pay the value of goods of like quality at the date of the breach of their contract. This is their stipulation in the bond, which cannot be enlarged by construction.

Having shown that, by the local law and the terms of the judgment itself, the value of the ice is no part of the judgment, the sureties on the bond can be in no way affected by the ascertainment of its value at the time of the replevin, in the course of the proceedings which resulted in the judgment.

That ascertainment was of the value at a different time, for a different purpose, and between other parties.